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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Human rights bodies and mechanisms

Free, prior and informed consent: a human rights-based approach

Study of the Expert Mechanism on the Rights of Indigenous Peoples

Summary

The Expert Mechanism on the Rights of Indigenous Peoples carried out the present study on a human rights-based approach to free, prior and informed consent in accordance with its mandate under Human Rights Council resolution 33/25.

The study concludes with Expert Mechanism advice No. 11 on indigenous peoples and free, prior and informed consent.

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I. Introduction

1. In accordance with its mandate under Human Rights Council resolution 33/25, at its tenth session, held in July 2017, the Expert Mechanism on the Rights of Indigenous Peoples decided to produce a study on free, prior and informed consent, as it appears in several provisions of the United Nations Declaration on the Rights of Indigenous Peoples. For this purpose, the Expert Mechanism held a seminar in Santiago on 5 and 6 December 2017. The present study was informed by presentations shared at the seminar and submissions by Member States, indigenous peoples, national human rights institutions, academics and others.¹

2. The study seeks to contribute to an understanding of free, prior and informed consent in the context of developing practices and interpretations of this human rights norm enshrined in the Declaration. Taking into account 11 years of advocacy and jurisprudence following the adoption of the Declaration, the present study is not intended to be either exhaustive or definitive, but should contribute to the body of interpretative guidance now available to States, indigenous peoples and others working on issues of concern to indigenous peoples.

II. Human rights basis of free, prior and informed consent

3. Free, prior and informed consent is a human rights norm grounded in the fundamental rights to self-determination and to be free from racial discrimination guaranteed by the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. The provisions of the Declaration, including those referring to free, prior and informed consent, do not create new rights for indigenous peoples, but rather provide a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples (see A/HRC/9/9, para. 86), as shown in the following sections.

4. Consistent with the right to self-determination, indigenous peoples have always had the inherent power to make binding agreements between themselves and other polities. The contemporary concept and practice of mutually negotiated, consensual agreement among indigenous peoples and State governments is deeply grounded in the historic treaty-making process that characterized indigenous-State relations for several hundred years in many regions of the world and persists in many places where those treaties remain the law of the land,² even if they have often been dishonoured.³ Historically and today, it can be challenging for indigenous peoples to negotiate with States under conditions of colonization and the many other limitations that often characterize the situation of indigenous peoples around the world.

5. Yet, as Special Rapporteur Miguel Alfonso Martínez concluded in his final report, the process of negotiation and seeking consent inherent in treaty-making is the most suitable way not only of securing an effective contribution from indigenous peoples to any effort towards the eventual recognition or restitution of their rights and freedoms, but also of establishing much needed practical mechanisms to facilitate the realization and implementation of their ancestral rights and those enshrined in national and international texts. It is thus the most appropriate way to approach conflict resolution of indigenous

¹ All the submissions are available from www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/StudyFPIC.aspx.

² E.g., Treaty No. 6 between the Cree and other Nations with the British Crown, in 1876, made reference to the requirement for "consent" in paragraph 3, as did article 16 of the 1868 Treaty of Fort Laramie between the United States of America and the Ojéti Sakowin States.

³ *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

issues at all levels with indigenous free and educated consent (see E/CN.4/Sub.2/1999/20, para. 263). He also referred to a widespread desire of indigenous peoples to establish a solid, new and different kind of relationship — quite unlike the almost constantly adversarial, often acrimonious relationship they had always had — with the non-indigenous sector of society in countries where they coexisted (ibid., para. 262). In this context, the standards for free, prior and informed consent articulated in the Declaration are particularly important to indigenous peoples' relationships with States today and going forward.

A. Self-determination

6. The right to self-determination is the fundamental human right upon which free, prior and informed consent is grounded. It includes internal and external aspects.⁴ Historically, the right to self-determination, which is rooted in the decolonization movement, was devised to ensure subjected nations and peoples could recover their autonomy, preside over their destinies, make decisions for themselves and control their resources.⁵ The right to self-determination was indeed construed as a pillar right, including other rights of peoples and nations to be free from coercion of any sort, to live in dignity and to enjoy all rights equally, including the right to be responsible for their futures, to be fully informed and to be in a position to freely refuse or accept offers, plans, projects, programmes and proposals that affected them or their resources.

7. The concepts of being free, being fully informed, having the right to say yes or no and having control over their own lands and resources as nations or peoples are not therefore new in international human rights law.⁶ These concepts derive from the elements of the right to self-determination, on which the Declaration bases its provisions on free, prior and informed consent, as a way of operationalizing the right to self-determination, taking into account the particular historical, cultural and social situation of indigenous peoples.

8. The international legal framework that conceptualized the right to self-determination paid particular attention to peoples and nations recovering control over their lands and natural resources as an important constituent element of the right to self-determination.⁷ It is for this reason that free, prior and informed consent is of particular relevance to lands and resources.

B. Non-discrimination

9. Free, prior and informed consent is also grounded in the human rights framework devised to dismantle the structural bases of racial discrimination against indigenous peoples. The Doctrine of Discovery,⁸ along with other doctrines of conquest that justified the legal and policy framework for dispossessing indigenous peoples of their lands and annihilating their cultures, was based on racial theories and principles that considered indigenous peoples as inferior beings who could not possibly own lands and decide their own futures. The international indigenous rights movement in the 1960s and 1970s highlighted systemic racial discrimination and human rights violations faced by indigenous peoples, prompting a study on the issue by the Sub-Commission on Prevention of

⁴ See Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge, Cambridge University Press, 1995).

⁵ See General Assembly resolution 1514 (XV).

⁶ See General Assembly resolution 1803 (XVII); and Nicolaas Schrijver, "Self-determination of peoples and sovereignty over natural wealth and resources" in *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (United Nations publication, Sales No. E.12.XIV.1).

⁷ See Marion Mushkatt, "The process of decolonization: international legal aspects", *University of Baltimore Law Review*, vol. 2, No. 1 (Winter 1972).

⁸ See the recommendations of the Permanent Forum on Indigenous Issues following its discussion on "The Doctrine of Discovery: its enduring impact on indigenous peoples and the right to redress for past conquests" (see E/2012/43-E/C.19/2012/13).

Discrimination and Protection of Minorities.⁹ This eventually led to the elaboration of the Declaration, as a dual framework combining remedial rights with ongoing rights.

10. As early as 1997, 10 years before the adoption of the Declaration by the General Assembly, the Committee on the Elimination of Racial Discrimination concluded that racial discrimination constituted the main underlying cause of most discrimination suffered by indigenous peoples. It affirmed that discrimination against indigenous peoples fell under the scope of the Convention and that all appropriate means had to be taken to combat and eliminate such discrimination.¹⁰ The Committee pointed specifically at "consent" as a human rights norm seeking to negate false doctrine and dismantle conceptual structures that dispossessed and disempowered indigenous peoples. It called upon States to ensure that members of indigenous peoples had rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests were taken without their informed consent.¹¹ It also called upon States to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they had been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.¹²

III. Free, prior and informed consent as a human rights norm

A. Rationale

11. Free, prior and informed consent as provided for in the Declaration has three major rationales. First, it seeks to restore to indigenous peoples control over their lands and resources, as specified in article 28. Some authors argue that, "free, prior and informed consent has its origins in the native title principle, according to which native people have their right to lands based on their customary law and sustained connection with the land",¹³ and others that "historical legal doctrine firmly establishes indigenous peoples' sovereign rights over ancestral lands and resources as a matter of long-standing international law".¹⁴ Second, the potential for free, prior and informed consent to restore indigenous peoples' cultural integrity, pride and self-esteem is reflected in article 11 of the Declaration. Indigenous peoples' cultural heritage, including human remains, taken without consent, are still held by others. Third, free, prior and informed consent has the potential to redress the power imbalance between indigenous peoples and States, with a view to forging new partnerships based on rights and mutual respect between parties (see A/HRC/EMRIP/2010/2), as reflected in articles 18 and 19 of the Declaration.

B. Nature of free, prior and informed consent as a human rights norm

12. The Declaration recognizes collective rights and protects collective identities, assets and institutions, notably culture, internal decision-making and the control and use of land and natural resources. The collective character of indigenous rights is inherent in indigenous culture and serves as a bulwark against disappearance by forced assimilation.

13. Free, prior and informed consent operates fundamentally as a safeguard for the collective rights of indigenous peoples. Therefore, it cannot be held or exercised by

⁹ See "Martinez Cobo Study" (E/CN.4/Sub.2/476 and Add.1-5; E/CN.4/Sub.2/1982/2 and Add.1-7; and E/CN.4/Sub.2/1983/21 and Add.1-7).

¹⁰ See Committee on the Elimination of Racial Discrimination general recommendation No. 23 (1997) on the rights of indigenous peoples.

¹¹ Ibid.

¹² Ibid.

¹³ See MacInnes, Colchester and Whitmore submission.

¹⁴ S. James Anaya, "Divergent discourses about international law, indigenous peoples, and rights over lands and natural resources: toward a realist trend", *Colorado Journal of International Environmental Law and Policy* (Spring 2005).

individual members of an indigenous community. The Declaration provides for both individual and collective rights of indigenous peoples. Where the Declaration deals with both individual and collective rights, it uses language that clearly distinguishes "indigenous peoples" from "individuals". Understandably, however, none of the provisions of the Declaration dealing with free, prior and informed consent (arts. 10, 11, 19, 28, 29 and 32) make any reference to individuals. To "individualize" these rights would frustrate the purpose they are supposed to achieve.¹⁵

C. Scope of free, prior and informed consent

1. Free, prior and informed consent: rights to consultation, participation and to lands and resources

14. Free, prior and informed consent is a manifestation of indigenous peoples' right to self-determine their political, social, economic and cultural priorities. It constitutes three interrelated and cumulative rights of indigenous peoples: the right to be consulted; the right to participate; and the right to their lands, territories and resources. Pursuant to the Declaration, free, prior and informed consent cannot be achieved if one of these components is missing.

15. States' obligations to consult with indigenous peoples should consist of a qualitative process of dialogue and negotiation, with consent as the objective (see A/HRC/18/42, annex, para. 9). The Declaration does not envision a single moment or action but a process of dialogue and negotiation over the course of a project, from planning to implementation and follow-up. Use in the Declaration of the combined terms "consult and cooperate" denotes a right of indigenous peoples to influence the outcome of decision-making processes affecting them, not a mere right to be involved in such processes or merely to have their views heard (see A/HRC/18/42). It also suggests the possibility for indigenous peoples to make a different proposal or suggest a different model, as an alternative to the one proposed by the Government or other actor.

16. Former Special Rapporteur on the rights of indigenous peoples James Anaya underscored that the Declaration suggests a heightened emphasis on consultations that are in the nature of negotiations towards mutually acceptable arrangements prior to decisions on proposed measures, rather than mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process (A/HRC/12/34, para. 46). Consultation will also often be the starting point for seeking free, prior and informed consent.

17. The right of indigenous peoples to participate in decision-making is provided for separately in article 18 of the Declaration, a provision grounded in article 25 of the International Covenant on Civil and Political Rights, which guarantees every citizen's right to "take part in the conduct of public affairs". The Declaration adapts this general right to participation to the needs and circumstances of indigenous peoples by seeking to achieve two objectives: first, to correct de jure and de facto exclusion of indigenous peoples from public life or decision-making processes owing to many factors, including prejudiced views against them, a low level of education, difficulties in obtaining citizenship or identification documents and non-participation in electoral processes and political institutions; and, second, to revitalize and restore indigenous peoples' own decisions-making and representative institutions that have either been disregarded or abolished. These institutions should be recognized, revitalized and given opportunities to participate in decision-making.

18. The Human Rights Committee has also elaborated on indigenous peoples' right to participate in a way that goes beyond consultation, noting that participation in the decision-making process must be "effective".¹⁶ The supervisory bodies of the International Labour Organization (ILO) have underlined the interconnection between consultation and

¹⁵ See Siegfried Weissner, "Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis", *Harvard Human Rights Journal*, vol. 12 (1999).

¹⁶ See *Poma Poma v. Peru* (CCPR/C/95/D/1457/2006), para. 7.6.

participation.¹⁷ Participation connotes more than mere consultation and should include the development of initiatives by indigenous peoples. "In this sense, the intertwined concepts of consultation and participation are mechanisms to ensure that indigenous peoples can decide their own priorities for the process of development and exercise control over their own economic, social and cultural development".¹⁸

19. The rights of indigenous peoples over their lands, resources and territories are also integral parts of free, prior and informed consent, as construed in the Declaration. The right to "own, use, develop and control" the lands, territories and resources (art. 26) gives rise to a right to free, prior and informed consent consistent with indigenous peoples' right of self-determination. In this regard, the role of free, prior and informed consent is to safeguard indigenous peoples' cultural identity, which is inextricably linked to their lands, resources and territories.

2. Constituent elements of free, prior and informed consent

20. As affirmed in the Declaration, decisions to grant or withhold consent must be free. The term "free" is understood as addressing both direct and indirect factors that can hinder indigenous peoples' free will. To that end, for a process of consultation to be genuine in the form of a dialogue and negotiation towards consent, the following should occur or the legitimacy of the consultation process may be called into question:

(a) The context or climate of the process should be free from intimidation, coercion, manipulation (see A/HRC/18/42, annex, para. 25) and harassment, ensuring that the consultation process does not limit or restrict indigenous peoples' access to existing policies, services and rights;

(b) Features of the relationship between the parties should include trust and good faith, and not suspicion, accusations, threats, criminalization (see A/HRC/39/17), violence towards indigenous peoples or prejudiced views towards them;

(c) Indigenous peoples should have the freedom to be represented as traditionally required under their own laws, customs and protocols, with attention to gender and representation of other sectors within indigenous communities. Indigenous peoples should determine how and which of their own institutions and leaders represent them. They should therefore enjoy the freedom to resolve international representation issues without interference;

(d) Indigenous peoples should have the freedom to guide and direct the process of consultation; they should have the power to determine how to consult and the course of the consultation process. This includes being consulted when devising the process of consultation per se and having the opportunity to share and use or develop their own protocols on consultation. They should exert sufficient control over the process and should not feel compelled to get involved or continue;

(e) Indigenous peoples should have the freedom to set their expectations and to contribute to defining methods, timelines, locations and evaluations.

21. Any free, prior and informed consent process must also be prior to any other decisions allowing a proposal to proceed and should begin as early as possible in the formulation of the proposal. The Inter-American Court of Human Rights in *Saramaka People v. Suriname* (2007) (the *Saramaka* case) uses the terms "early stage" and "early notice". To that end, the "prior" component of free, prior and informed consent should entail:

(a) Involving indigenous peoples as early as possible. Consultation and participation should be undertaken at the conceptualization and design phases and not

¹⁷ See ILO Committee of Experts on the Application of Conventions and Recommendations, general observation on indigenous and tribal peoples (observation 2010/81).

¹⁸ See International Labour Organization, *Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169): Handbook for ILO Tripartite Constituents* (Geneva, 2013), p. 19.

launched at a late stage in a project's development, when crucial details have already been decided;

(b) Providing the time necessary for indigenous peoples to absorb, understand and analyse information and to undertake their own decision-making processes (see A/HRC/18/42, annex, para. 25).

22. Consultation in the free, prior and informed consent context should be "informed", implying that:

(a) The information made available should be both sufficiently quantitative and qualitative, as well as objective, accurate and clear;

(b) The information should be presented in a manner and form understandable to indigenous peoples, including translation into a language that they understand. Consultations should be undertaken using culturally appropriate procedures, which respect the traditions and forms of organization of the indigenous peoples concerned (see A/HRC/18/42). The substantive content of the information should include the nature, size, pace, reversibility and scope of any proposed project or activity (see E/C.19/2005/3); the reasons for the project; the areas to be affected; social, environmental and cultural impact assessments; the kind of compensation or benefit-sharing schemes involved; and all the potential harm and impacts that could result from the proposed activity;¹⁹

(c) Adequate resources and capacity should be provided for indigenous peoples' representative institutions or decisions-making mechanisms, while not compromising their independence. Such institutions or decision-making processes must be enabled to meet technical challenges — including, if necessary, through capacity-building initiatives to inform the indigenous peoples of their rights in general — prior or parallel to the process of consultation. For example, the Australian Referendum Council recommended that the Government of Australia consider proposals designed by Aboriginal and Torres Strait Islander peoples during 13 regional dialogues and a national indigenous constitutional convention in May 2017 calling for a new First Nations representative public institution called "Voice to Parliament" based on articles 18 and 19 of the Declaration.²⁰ In two cases (*Finmark Estate Agency v. Nesseby regional society* (the *Unjárga* case) and *Norway v. Jovsset Ante Iversen Sara* (the *Sara* case)), the Supreme Court of Norway referred to the consent and participation of the Sami Parliament as support for its decision that national legislation was in accordance with international law on indigenous rights, including the Declaration, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169).²¹ However, in the *Sara* case, the Court referred to the participation of the Sami Parliament as support for its decision, although consent was not achieved. It is a concern if participation is used as support for State decisions where consent is not achieved, as this could discourage indigenous peoples from participating in decision-making processes.

23. Failure to engage with legitimate representatives of indigenous peoples can undermine any consent received. In the Declaration it is clear that States and third parties should consult and cooperate with indigenous peoples "through their own representative institutions" (arts. 19 and 32) and "in accordance with their own procedures" (art. 18). All parties should ensure representation from women, children,²² youth and persons with disabilities, and efforts should be made to understand the specific impacts on them (see

¹⁹ United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries, *Guidelines on Free, Prior and Informed Consent* (Geneva, 2013).

²⁰ See www.referendumcouncil.org.au/final-report.

²¹ See www.domstol.no/en/Enkelt-domstol/-norges-hoyesterett/rulings/rulings-2018/the-scope-of-collective-rights-of-use-to-land-in-nesseby-finnmark/ and www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2017-2428-a.pdf.

²² The Committee on the Rights of the Child in its general comment No. 11 (2009) on indigenous children and their rights under the Convention notes that the right of the child to be heard includes the right to representation.

A/HRC/18/42). Yet, identifying the legitimate representatives of indigenous peoples can be challenging. States should be mindful of situations where indigenous peoples' decision-making institutions have been undermined by colonialism and where communities have been dispersed, dispossessed of land or relocated, including to urban areas. These situations may require State assistance to rebuild indigenous peoples' capacity to represent themselves appropriately. It is important for States or third parties to ensure that institutions supporting indigenous peoples and claiming to represent them are so mandated.

D. Consent

24. As former Special Rapporteur James Anaya has stated, consent is not a freestanding device of legitimation. The principle of free, prior and informed consent, arising as it does within a human rights framework, does not contemplate consent as simply a "yes" to a predetermined decision (A/HRC/24/41, para. 30). This means that consent can only be received for proposals when it fulfils the three threshold criteria of having been free, prior and informed, and is then evidenced by an explicit statement of agreement.

25. Consent is a key principle that enables indigenous peoples to exercise their right to self-determination, including development that involves control over or otherwise affects their lands, resources and territories. With such an understanding, indigenous peoples are considered to engage with and are entitled to give or withhold consent to proposals that affect them.

26. Indigenous peoples' decision to give or withhold consent is a result of their assessment of their best interests and that of future generations with regard to a proposal. When they give their consent it provides an important social licence and a favourable environment to any actor operating on and around their lands, territories and resources, as many studies and research have shown, including by the private sector.²³ Indigenous peoples may withhold their consent in a number of situations and for various purposes or reasons:

(a) They may withhold consent following an assessment and conclusion that the proposal is not in their best interests. Withholding consent is expected to convince the other party not to take the risk of proceeding with the proposal. Arguments of whether indigenous peoples have a "veto" in this regard appear to largely detract from and undermine the legitimacy of the free, prior and informed consent concept;

(b) Indigenous peoples may withhold consent temporarily because of deficiencies in the process. Such deficiencies often consist of non-compliance with the required standards for the consent to be free, prior and informed. Indigenous peoples may seek adjustment or amendment to the proposal, including by suggesting an alternative proposal;

(c) Withholding consent can also communicate legitimate distrust in the consultation process or national initiative. This is generally the situation in countries where there is insufficient recognition of indigenous peoples or protection of their rights to lands, resources and territories. Cases of indigenous peoples being harassed, arrested and even being killed for resisting "trap-like" consultation offers are numerous.

27. Withholding consent can be a positive mechanism for democratic and inclusive governance. It can be of critical importance to the ultimate success of a proposal or project. Indigenous peoples' consent should be given "in accordance with international human rights standards" (Declaration, art. 34) and particular attention should be paid "to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities", including in the elimination of all forms of discrimination and violence against indigenous children and women (ibid., art. 22).

²³ Cathal M. Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent*, Routledge Research in Human Rights Law (London and New York, Routledge, 2014), chap. 5.

28. In any event, a number of countries and stakeholders have endorsed a policy not to proceed if indigenous peoples withhold their consent. The United Nations Global Compact, in its business reference guide on the Declaration,²⁴ advises its members not to proceed with a project after the withholding of consent by indigenous peoples. A State or stakeholder that decides to proceed after consent is withheld by indigenous peoples moves into a legal grey area and exposes itself to judicial review and other types of recourse mechanisms, potentially including international, regional and national tribunals, and by indigenous peoples' own institutions (see paras. 38–41 below);

29. Particular caution should be exercised regarding indigenous peoples in voluntary isolation or of recent contact, including the non-imposition of contact and the obligation to protect their territories, natural resources and lives. In the case of indigenous peoples in voluntary isolation, the decision and expression not to be in contact or not to have constant interaction with other societies and the Government can be an expression of non-consent. States should respect their will and are obliged to protect their lives through the protection of their territories and natural resources.²⁵

30. If indigenous peoples choose to give their consent to a project, consent should be consistent with indigenous peoples' own laws, customs, protocols and best practices, including representation by legal counsel whenever possible and as required by law. In many, if not all, instances, consent must be recorded in a written instrument, negotiated by the parties, and signed affirmatively by a legitimate authority or leader of the relevant indigenous peoples, which may include more than one group (see paras. 42–45 below). Full understanding by indigenous peoples must be ensured and additional measures should be taken by the State in cases involving indigenous peoples of recent contact.

E. Operationalization of free, prior and informed consent

1. When is free, prior and informed consent required?

31. The Declaration contains five specific references to free, prior and informed consent (see arts. 10, 11, 19, 29 and 32), providing a non-exhaustive list of situations when such consent should apply. Free, prior and informed consent may be required for adoption and implementation of legislative or administrative measures²⁶ and any project affecting indigenous peoples' lands, territories and other resources, within the context referred to in the paragraphs below (arts. 19 and 32). It is also required in instances of relocation of indigenous peoples from their lands or territories and storage of hazardous materials on their lands or territories (arts. 10 and 29).²⁷

32. The role of free, prior and informed consent in the realm of natural resource development is set out in article 32 of the Declaration. This provision is particularly important given the well-known risks and impacts of extractive industries on indigenous peoples (see A/HRC/24/41, A/HRC/21/52 and A/HRC/21/55). As stated by James Anaya, the general rule in the case of extractive industries' projects within the territories of indigenous peoples is that the free, prior and informed consent of indigenous peoples is required. Indigenous peoples' consent may also be required when extractive activities

²⁴ See www.unglobalcompact.org/library/541.

²⁵ See <http://periodicos.unb.br/index.php/ling/article/view/26661> (in Portuguese).

²⁶ Many indigenous peoples suggest that social development programmes often have an impact on their customary laws, traditions and customs, including cultural, intellectual, religious and spiritual property for which free, prior and informed consent should be obtained (cf., Declaration, art. 11, para. 2; see also <http://iphdefenders.net/statement-asia-indigenous-peoples-pact-asia-indigenous-peoples-caucus-agenda-4-study-advice-free-prior-informed-consent/>.)

²⁷ Article 29 of the Declaration is the basis for the revision of the International Code of Conduct on the Distribution and Use of Pesticides and review of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade by the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes.

otherwise affect indigenous peoples (outside their territories), depending upon the nature of and potential impacts of the proposed activities on their rights (see A/HRC/24/41).

2. The proportionality principle

33. In several articles, the Declaration calls for free, prior and informed consent regarding matters, projects or issues that “affect” indigenous peoples. This concept is not limited to matters that affect indigenous peoples exclusively. To the contrary, matters of broad societal application “may affect indigenous peoples in ways not felt by others in society” (see A/HRC/12/34, para. 43). Measures and projects considered to “affect” indigenous peoples to the extent that free, prior and informed consent will be required under articles 19 and 32 include matters of “fundamental importance to their rights, survival, dignity and well-being” (A/HRC/21/55, para. 27). Relevant factors in this assessment include: the perspective and priorities of the indigenous peoples concerned; the nature of the matter or proposed activity and its potential impact on the indigenous peoples concerned, taking into account, inter alia, the cumulative effects of previous encroachments or activities²⁸ and historical inequities faced by the indigenous peoples concerned (see A/HRC/18/42 and A/HRC/21/55).

34. The perspective of the indigenous peoples concerned on the potential broader impact of a decision is the starting point for assessing whether a legislative or administrative measure or any project affecting their lands or territories and other resources affects them (see A/HRC/18/42). Indigenous peoples should have a major role in establishing whether the measure or project affects them at all and, if it does, the extent of the impact. Indigenous peoples may highlight possible harms that may not be clear to the State or project proponent, and may suggest mitigation measures to address those harms.

35. As to impact, if a measure or project is likely to have a significant, direct impact on indigenous peoples’ lives or land, territories or resources then consent is required (see A/HRC/12/34, para. 47). It has been referred to as a “sliding scale approach” to the question of indigenous participatory rights, which means that the level of effective participation that must be guaranteed to indigenous peoples is essentially a function of the nature and content of the rights and activities in question.²⁹ This view is supported by the Human Rights Committee,³⁰ which uses the language “substantive negative impact”, and the Committee on Economic, Social and Cultural Rights. Both have linked the issue of free, prior and informed consent to the nature and the effects that a proposed initiative will have on indigenous peoples’ rights in the respective human rights treaty: an approach in line with the jurisprudence of the Inter-American Court of Human Rights³¹ and the African Commission on Human and Peoples’ Rights.³² Assessment of the impact requires consideration of the nature, scale, duration and long-term impact of the action, such as damage to community lands or harm to the community’s cultural integrity.

36. Other projects requiring free, prior and informed consent and tending to have “adverse impacts” as defined by International Finance Corporation Performance Standard 7, include projects located on lands, or natural resources on lands, subject to traditional ownership or under customary use; and projects significantly impacting on critical cultural heritage of indigenous peoples or using cultural heritage, including knowledge, innovation or practices for commercial purposes.³³

37. A number of domestic court decisions support these principles. An expansive view of consent was recently taken by the Supreme Court of Canada in the case of *Tsilhqot’in Nation v. British Columbia* (2014). The Court decided that once the right of an indigenous

²⁸ See *Saramaka case*.

²⁹ Gaetano Pentassuglia, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective*, International Studies in Human Rights, vol. 102 (Brill/Nijhoff, 2009), p. 113.

³⁰ See *Lánsman et al. v. Finland* (CCPR/C/52/D/511/1992) and *Poma Poma v. Peru*.

³¹ See *Saramaka case*.

³² See *Centre for Minority Rights Development v. Kenya*, 276/03 (the *Endorois case*).

³³ See Performance Standard 7 (2012) on Indigenous Peoples; and Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources*, chap. 5.

community to control a portion of land has been recognized, no use of that land will be permitted without the consent of that community.³⁴ The Constitutional Court of Colombia recognizes three situations in which consent is mandatory: displacement of indigenous peoples; the storage of toxic waste; and when the existence of the group is put at risk.³⁵ The Constitutional Court of the Plurinational State of Bolivia has recognized similar situations as warranting consent, as established by the Inter-American Court of Human Rights.³⁶ The need for consent in the case of large-scale development projects on indigenous lands was generally agreed by the Constitutional Court of Colombia.³⁷ The Supreme Court of Belize has made express references to free, prior and informed consent, including to article 32 of the Declaration, ultimately finding that the failure to obtain consent prior to granting concessions and permissions was unlawful.³⁸

38. Certain rights, such as the right to be free from torture, are never subject to limitation by States. Even for those rights that may, theoretically, be limited by States in accordance with article 46, paragraph 2, of the Declaration, such limitation must be necessary and proportionate for the purpose of achieving the human rights objectives of the society as a whole and be non-discriminatory. As James Anaya has said, "no valid public objective is found in mere commercial purpose, private gains or revenue-raising objective".³⁹ Given the nature of the impact of large-scale development projects on the rights of indigenous peoples, it will often be difficult to justify such projects in view of these restrictions.

39. The burden of proof is on the State to demonstrate that the decision to pursue the activity following failure to obtain consent meets these exceptional criteria. In *Tsilhqot'in Nation*, the Supreme Court of Canada held that consent may only be overridden in strict circumstances when the government can demonstrate that: it has discharged its responsibilities in respect of the rights of the peoples concerned, including a procedural duty to consult; the action is aimed at pursuing an objective that is compelling and substantial from the perspective of the broader public and the indigenous community; the action will not substantially deprive future generations of an aboriginal group of the benefits of their land; and the principle of necessity and proportionality applies.⁴⁰

40. Any decision to limit indigenous peoples' rights within the exceptional circumstances of article 46 must be accompanied not only by necessary safeguards, including redressing balance-of-power issues, impact assessments, mitigation measures, compensation and benefit sharing, but also by remedial measures taking into account any rights violations. The need for benefit sharing was also referred to in the *Saramaka* case, and in the *Endorois* case the African Commission on Human and Peoples' Rights stated that benefit sharing may be understood as a form of reasonable equitable compensation resulting from the exploitation of traditionally owned lands and of those natural resources necessary for the survival of the community. Of course, in some cases, including injuries to human life, sacred sites and cultural practices, it may be difficult or impossible to put a financial valuation on rights violations. Any tensions in this regard arising within indigenous communities in the process of seeking free, prior and informed consent should be resolved by the indigenous peoples themselves, in accordance with their own laws, traditions and customs, through their own representative institutions.

³⁴ For more Canadian Supreme Court cases see Mauro Barelli, "Free, Prior and Informed Consent in the United Nations Declaration on the Rights of Indigenous Peoples", in *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, Jessie Hohmann and Marc Weller, eds. (Oxford, Oxford University Press, 2018).

³⁵ Case T-129 of 3 March 2011.

³⁶ Case No. 2003/2010 R of 25 October 2010 and Barelli, "Free, Prior and Informed Consent".

³⁷ Cases T-769/09 of 29 October 2009, T-129 of 11 March 2011 and T-376/12 of 18 May 2012; see also Barelli, "Free, Prior and Informed Consent".

³⁸ See *Sarstoon Temash Institute for Indigenous Management v. Belize*, 3 April 2014.

³⁹ S. James Anaya and Sergio Puig, "Mitigating State sovereignty: the duty to consult with indigenous peoples", *University of Toronto Law Journal*, vol. 67, No. 4 (Fall 2017).

⁴⁰ See *Endorois* case.

41. Given that the pursuit of an activity or measure that affects indigenous peoples may result in a violation of their human rights, there should be a possibility for judicial or administrative review in the event that indigenous peoples wish to challenge that decision.⁴¹ Such judicial or administrative review should be based on indigenous peoples' rights in the Declaration, including their rights to self-determination and effective remedies,⁴² and their rights under human rights treaty law, regional and domestic law, and indigenous peoples' own laws, customs and protocols.

3. Documenting, monitoring, reviewing and recourse mechanism for free, prior and informed consent

42. Free, prior and informed consent should be documented, capturing the steps for accomplishing such consent and the essence of the agreement reached by the concerned parties, in accordance with indigenous peoples' customary norms and traditional methods of decision-making, including diverging opinions and conditional views. Guidelines or models for seeking free, prior and informed consent that are developed by either States or private actors should not prevail over indigenous peoples' own community protocols or traditional practices of capturing or recording agreements.

43. Forms of expressing consent may include, for example, treaties, agreements and contracts. Often terms are commemorated in a memorandum of agreement or understanding, or other document that is satisfactory to the indigenous peoples. Translation services must be provided where needed. Indigenous peoples must have the opportunity, moreover, to consent to each relevant aspect of a proposal or project. A generalized or limited statement of consent that, for example, does not expressly acknowledge different phases of development or the entire scope or impact of the project will not be considered to meet the standard for consent. Consent must be "ongoing" with express opportunities and requirements for review and renewal set by the parties.

44. Agreements on consent should include detailed statements of the project, its duration and the potential impacts on the indigenous peoples, including their lands, livelihoods, resources, cultures and environments (see A/HRC/24/41, para. 73); provisions for mitigation, assessment, and reimbursement for any damages to those resources; statements of indemnification of indigenous peoples for injuries caused to others on their lands; methods and venues for dispute resolution; detailed benefit-sharing arrangements (including investment, revenue sharing, employment and infrastructure); and a timetable of deliverables, including opportunities to negotiate continuing terms and licences. As a matter of best practice, any form of consent should include a detailed description of the process of notice, consultation and participation that preceded the consent.

45. As a dynamic process, the implementation of free, prior and informed consent should also be monitored and evaluated regularly. Such agreements should "include mechanisms for participatory monitoring" (ibid.). The ILO Committee of Experts on the Application of Conventions and Recommendations underlines the need for "periodic evaluation of the operation of the consultation mechanisms, with the participation of the peoples concerned" to continue to improve their effectiveness.⁴³ The implementation of free, prior and informed consent should also include accessible recourse mechanisms for disputes and grievances, devised with the effective participation of indigenous peoples, including judicial review.

⁴¹ See statement of James Anaya at conference on "The role of the Ombudsman in Latin America: the right to prior consultation with indigenous peoples", Lima, 25 April 2013. Available from <http://unsr.jamesanaya.org/statements/el-deber-estatal-de-consulta-a-los-pueblos-indigenas-dentro-del-derecho-internacional> (in Spanish).

⁴² See *Poma Poma v. Peru*.

⁴³ ILO observation 2010/81, p. 7.

IV. Review of free, prior and informed consent practices

46. The United Nations Declaration on the Rights of Indigenous Peoples and the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169) are complementary and mutually supportive, and both are cited by judicial and quasi-judicial bodies. As emphasized by the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, following a visit to Guatemala, "compliance with the obligations of ILO Convention 169 is not limited to the regulation of the right to consultation, but requires the application of the full range of rights affirmed in that instrument".⁴⁴

47. The Declaration, including its free, prior and informed consent requirements, is founded on the right to self-determination, which was not necessarily at the heart of the ILO Convention when it was drafted in 1971. The *travaux préparatoires* of that Convention appear to reveal that this instrument did not specifically address the right to self-determination of indigenous peoples. As a result, the free, prior and informed consent requirement under the Declaration goes beyond the consultation requirement of the ILO Convention, at least as interpreted in the past by some States and others, such as in Latin America, where the ILO Convention is most widely ratified.⁴⁵ Yet, while the ILO Convention contains different wording from "free, prior and informed consent", elements of consent requirements are present⁴⁶ that would not preclude a substantive free, prior and informed consent-driven approach. Noting that "the protection of human rights evolves",⁴⁷ the Human Rights Committee has stated that the International Covenant on Civil and Political Rights should be interpreted as a living instrument, with the rights protected under it applied in context and in the light of present-day conditions. A similar approach applied to the ILO Convention could broaden an interpretation that some may regard as overly narrow.

48. With regard to consent, Indigenous and Tribal Peoples Convention, 1989 (No. 169), cannot be interpreted in isolation from the Declaration and other international instruments. As emphasized by ILO, differences in the legal status of the Declaration and the ILO Convention "should play no role in the practical work of the ILO and other international agencies to promote the human rights of indigenous peoples ... The provisions of Convention No. 169 and the Declaration are compatible and mutually reinforcing".⁴⁸ Special Rapporteur on the rights of indigenous peoples Victoria Tauli-Corpuz also affirms that the ILO Convention is not the only source of legal obligation with respect to consultation and free, prior and informed consent (see A/HRC/33/42/Add.1, para. 98 (b)). State obligations to consult indigenous peoples also derive from universal and regional human rights instruments of general application and the interpretative jurisprudence by supervisory mechanisms of these instruments. The interpretation of the ILO Convention could be aligned with the emerging consensus of human rights bodies on free, prior and informed consent, as imposing both procedural and substantive requirements, including the emerging consensus in international law that large-scale development projects affecting indigenous peoples will often trigger free, prior and informed consent requirements. The Special Rapporteur's view is reflected in article 35 of the ILO Convention, which states that: "the application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements".

⁴⁴ See www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=23068&LangID=E.

⁴⁵ Ibid; see also "Additional comments on Honduras, 9 June 2017" available at <http://unsr.vtaulicorpuz.org/site/images/docs/special/2017-06-09-honduras-unsr-additional-observations.pdf> (in Spanish).

⁴⁶ See S.J. Rombouts, "The evolution of indigenous peoples' consultation rights under the ILO and UN regimes", *Stanford Journal of International Law*, vol. 53, No. 2 (Spring 2017).

⁴⁷ See *Judge v. Canada* (CCPR/C/78/D/829/1998), para. 10.7.

⁴⁸ "ILO standards and the UN Declaration on the Rights of Indigenous Peoples: Information note for ILO staff and partners", available from <http://pro169.org/res/materials/en/convention169/Information%20Note%20on%20ILO%20standards%20and%20UNDRIP.doc>.

49. In the private sector, free, prior and informed consent is developing into an international standard for companies operating on indigenous lands. In November 2014, First Peoples Worldwide published the "Indigenous Rights Risk Report",⁴⁹ finding that 89 per cent of the projects assessed had a high or medium risk exposure "to indigenous community opposition or violations of indigenous peoples' rights" and that Governments that disregarded their commitments to the Declaration, often with the justification that they were obstacles to development, "actually propagate volatile business environments that threaten the viability of investments in their countries". Many entities such as extractive industries are aware of these risks inherent in not soliciting free, prior and informed consent and have endeavoured to create their own free, prior and informed consent protocols.

50. There are numerous publications outlining the business case for free, prior and informed consent⁵⁰ and an increase in policy commitments to free, prior and informed consent by companies between 2012 and 2015: a report from Oxfam concluded that, "extractive industry companies are increasingly seeing the relevance of free, prior and informed consent in their operations".⁵¹ A guide for businesses by the United Nations Global Compact equates consent with "a formal, documented social licence to operate", noting that "indigenous peoples have the right to give or withhold consent, and in some circumstances, may revoke their consent previously given".⁵² Thus, for example, between 1975 and 2015 First Nations entered into formal "impact benefit agreements" in respect of 198 mining projects in Canada; however, sometimes these are agreed upon in the framework of an unwanted project to which First Nations believe they cannot object.

51. At least one third of the Sustainable Development Goal targets are linked to the rights in the Declaration⁵³ and a number of them have been connected to free, prior and informed consent.⁵⁴ In its Voluntary National Report 2017, Malaysia listed under Goal 15 (life on land) the aim to include indigenous and local communities in the management of natural resources and recognition of their right to give or withhold consent to proposed projects that may affect their lands. Indigenous peoples demand the recognition of free, prior and informed consent in the implementation of the Sustainable Development Goals to address their distinct circumstances with a view to ensuring that "no one is left behind".

52. Article 8 (j) of the Convention on Biological Diversity, which refers to access to traditional knowledge being subject to the approval and involvement of the holders of traditional knowledge, has been consistently interpreted as "prior and informed consent", and "free, prior and informed consent", as substantiated in the Akwé: Kon Voluntary Guidelines. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity establishes that access to traditional knowledge associated with genetic resources is based on "prior informed consent" or "approval and involvement" and on an equitable sharing of benefits. The Green Climate Fund has developed its own interpretation of free, prior and informed consent based on the Declaration. Article 29 of the Declaration is also the basis for the revision of the International Code of Conduct on the Distribution and Use of Pesticides as endorsed by the International Indian Treaty Council, the Permanent Forum on Indigenous Issues and other bodies.

53. International Finance Corporation Performance Standard 7 on Indigenous Peoples (2012) conditions funding of the private sector on documenting consent in certain circumstances. The receipt of free, prior and informed consent is also one of the nine fundamental principles guiding engagement of the International Fund for Agricultural

⁴⁹ Available at <https://mahb.stanford.edu/wp-content/uploads/2014/12/Indigenous-Rights-Risk-Report.pdf>.

⁵⁰ E.g., *Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges* (Foley-Hoag LLP, July 2010); and Boreal Leadership Council, *Free, Prior and Informed Consent in Canada* (September 2012).

⁵¹ See www.oxfam.org/en/pressroom/pressreleases/2015-07-23/global-mining-companies-improve-policies-community-consent-while.

⁵² See www.unglobalcompact.org/library/541, p. 28.

⁵³ See http://nav.indigenounavigator.com/images/Documents/Tools/Navigator_UNDRIP-SDGs.pdf.

⁵⁴ Goals 3, 6, 8, 9, 11 and 15.

Development with indigenous peoples. The new Environment and Social Standard 7, adopted by the World Bank in August 2016, is more aligned with a human rights-based approach to consultation than its predecessor (Operational Policy 4.10), and calls for borrowers to carry out consultations with indigenous peoples' representative bodies and organizations. This links consultation to the grass-roots indigenous organizations whose lands and resources might be adversely affected.⁵⁵ The 2013 edition of the Equator Principles, a risk management framework adopted by 80 financial institutions, expressly requires that projects with adverse impacts on indigenous peoples will require their free, prior and informed consent.

54. However, despite the recognition of free, prior and informed consent by financial institutions and the private sector, the experience of indigenous peoples shows that problems remain with its implementation. The process of seeking free, prior and informed consent is, at times, viewed as merely procedural in nature, rather than focused on human rights. It is sometimes seen as a goodwill gesture to indigenous peoples and can lead to serving third party interests rather than protecting the rights-holders interests. A debate around the first project of the Green Climate Fund in Peru in 2015, "PROFONANPE", for example, suggests a lack of understanding about the operative implications of free, prior and informed consent and issues related to full and effective participation and consultation of indigenous peoples.⁵⁶ Questions also remain on the application of free, prior and informed consent as now recognized in World Bank Performance Standard 7; in no instance should this policy lower the level of protection achieved for indigenous peoples.⁵⁷

55. Some concerns have been raised about the many guidelines on free, prior and informed consent, including that the language used is often imprecise and sometimes introduces ambiguities, for example with respect to the point at which impact assessments are required or when consultation should begin. Sometimes these guidelines do not address the issue of indigenous peoples wishing to define their own consent process and to control aspects of the impact assessments. In addition, there is sometimes ambiguity in the event that consent is not forthcoming.

56. To ensure that financial institutions and the private sector can better align their policies with the rights protected in the Declaration, there is a need to develop and adopt stringent social and environmental safeguards, an indigenous peoples' policy based on international human rights standards and the Declaration, and effective oversight and compliance mechanisms and to ensure that indigenous peoples are involved throughout the process. As States are the duty bearers in implementing indigenous peoples' rights, their human rights obligations cannot be delegated to a private company or other entity (see A/HRC/12/34) and they remain responsible for any inadequacy in the process.

57. Indigenous peoples are also establishing their own protocols for free, prior and informed consent, particularly in North America and Latin America, including in Belize, Bolivia (the Plurinational State of), Brazil, Canada, Colombia, Guatemala, Honduras, Paraguay, Suriname and the United States of America. These protocols are an important tool in preparing indigenous peoples, States and other parties to engage in a consultation or free, prior and informed consent process, setting out how, when, why and whom to consult. The establishment of these protocols is an instrument of empowerment for indigenous peoples, closely linked to their rights to self-determination, participation and the development and maintenance of their own decision-making institutions (see A/HRC/EMRIP/2010/2). The right to be consulted "through their own representative institutions", mentioned in several articles relating to free, prior and informed consent, suggests the seriousness with which they should be recognized. In some cases, these

⁵⁵ Other international and regional organizations that have incorporated free, prior and informed consent into their policies and programmes on indigenous peoples include the United Nations Development Programme, the Food and Agricultural Organization of the United Nations, the Inter-American Development Bank and the European Bank for Reconstruction and Development.

⁵⁶ See www.forestpeoples.org/en/topics/un-framework-convention-climate-change-unfccc/publication/2015/green-climate-fund-and-fpic-ca.

⁵⁷ See <http://indianlaw.org/indh/world-bank-approves-indigenous-peoples-policy>.

protocols have been recognized by the State (for example, Brazil)⁵⁸ and in others by the World Bank (Belize). In January 2018, a Federal Court in the state of Amazonas in Brazil demanded compliance with free, prior and informed consent for the Waimiri Atroari people regarding any law or development plan affecting them and regarding military activities on their lands.⁵⁹

58. Many States have started to adopt legislation, practices and guidelines on consulting and obtaining consent. In the United States, several federal statutes require consultation, for example with respect to indigenous peoples' sacred sites, cultural patrimony and human remains. In some instances, federal agencies have adopted the Declaration⁶⁰ or otherwise entered into consensual agreements with indigenous peoples regarding these matters.⁶¹ In Latin America, States have either enacted or are discussing enacting laws on consultation with indigenous peoples. A general consultation mechanism aimed at obtaining free, prior and informed consent has recently been established by Costa Rica.⁶² Assuming that the necessary measures are taken to ensure its implementation, it can hopefully be used as a good practice for other States. There are also laws, practices or guidelines in Argentina, Canada, Chile, Ecuador, Finland, Guatemala, Mexico, Peru, the Philippines, the United States and Venezuela (the Bolivarian Republic of), among others. Some States are in the process of developing protocols on free, prior and informed consent, including the Democratic Republic of the Congo, Chile, Honduras, Paraguay and Suriname. The development of some of these laws has not been without criticism (see E/CN.4/2004/80/Add.2, A/HRC/27/52/Add.3 and A/HRC/33/42/Add.2). The Expert Mechanism has highlighted some of the requirements that such legislation should contain to ensure free, prior and informed consent in an advisory note of 2018, including adequate resources, equality and a mechanism to monitor agreements.⁶³ During its technical cooperation mission to Mexico City, the Expert Mechanism welcomed the inclusion of free, prior and informed consent in the City's Constitution, adopted in January 2017.

59. In Colombia, there is no law regulating free, prior and informed consent. However, between 1991 and 2012, around 156 consultations have taken place⁶⁴ pursuant to obligations laid down by the Constitutional Court (see para. 37 above). Of those, 3 out of 10 cases have been opposed by indigenous peoples,⁶⁵ and 95 per cent of projects and development activities have reached favourable outcomes.⁶⁶ A recent consultation process in Colombia, which culminated in a decree for the protection of isolated people, appears to have been a good practice, having involved dialogue with indigenous organizations and communities near isolated groups.⁶⁷ South Africa does not have a mechanism, but consultation and consent procedures have been successfully pursued through the Nagoya Protocol. In the Russian Federation, on a subnational level indigenous peoples are entitled to initiate and participate in "ethnological impact assessments" prior to decision-making on planned economic and other activity, and to access the results and recommendations; however, only international companies comply with this procedure due to the lack of regulation and legal clarity on who can represent indigenous peoples in negotiations.⁶⁸

⁵⁸ The state and federal government are using the Wajãpi Consultation Consent Protocol in the case of the expansion of a non-indigenous settlement neighbouring the Wajãpi indigenous land in the state of Amapá.

⁵⁹ See www.mpf.mp.br/am/sala-de-imprensa/docs/decisao-liminar-acp-waimiri-atroari-ditadura (in Portuguese).

⁶⁰ See www.achp.gov/UNdeclaration.html.

⁶¹ See Robert J. Miller, "Consultation or consent: the United States duty to confer with American Indian governments", *North Dakota Law Review*, vol. 91 (2015).

⁶² See www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=77482&nValor3=97132&strTipM=TC (in Spanish).

⁶³ Available from www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Session11.aspx.

⁶⁴ See Garavito and Diaz submission.

⁶⁵ See Gerber submission.

⁶⁶ See Colombia national human rights institution submission.

⁶⁷ See <http://opiac.org.co/los-pueblos-indigenas-de-la-amazonia-colombiana-celebramos-la-firma-del-decreto-de-proteccion-para-pueblos-indigenas-aislados/> (in Spanish).

⁶⁸ See Novikova submission (in Russian).

60. There are concerns, however, about some of the legislation and practices on free, prior and informed consent emerging around the world. These include that some consultation laws have been elaborated, quite ironically and problematically, without consultation with indigenous peoples. Additional concerns include a narrow focus on obligations under Indigenous and Tribal Peoples Convention, 1989 (No. 169) and not on the United Nations Declaration or regional or international human rights obligations; a focus on the procedural steps of a consultation process, without ensuring the genuine participation and protection of the rights of affected indigenous peoples; and a failure to address the structural concerns that violate the rights of indigenous peoples. Often, the right to consultation has not been translated into a law guaranteeing its enforcement, and the requirements of what constitutes consent are not clarified.

61. Indigenous peoples also raise concerns about “consultation fatigue”; “manufactured” consent; limits put on consultation; a lack of a common understanding of international standards relating to free, prior and informed consent; an increase in encroachments of extractive industries; and a lack of structural change to ensure free, prior and informed consent at the institutional level. These problems not only harm indigenous peoples, whose rights are often disregarded in development plans, but also lead to work-stoppages, protests, litigation and other problems with negative financial and political implications for States and industry alike.⁶⁹ For all of these reasons, the need for effective mechanisms for the operationalization of free, prior and informed consent are becoming urgent. The absence of rights-based regulatory mechanisms defining how to carry out a consultation encourages contradictory interpretations of which measures and projects need to be preceded by consultation processes and which require consent.

62. National human rights institutions play an important role in contributing towards the implementation of free, prior and informed consent. As bodies acting independently from the Government, some with an expertise in the area of indigenous peoples, they can and do fulfil many roles in the consent context. For example, in Argentina, the national human rights institution intervened in a project by ArSat Co. Telecommunications, where it had several roles, including as general coordinator of the whole process, facilitator and guarantor controlling compliance with the legal framework. Its engagement included an open consultation process that overcame three years of roadblocks. In the Bolivarian Republic of Venezuela, the national human rights institution promotes the application of prior consultation mechanisms, ensures that the right to consultation is incorporated in legislation and carries out activities promoting the right to prior consultation.

⁶⁹ In North America, failed consultations regarding development using the traditional lands and resources of indigenous peoples have led to years of costly litigation, protests and delay, even if the projects are ultimately approved. See, e.g., *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 255 F.Supp.3d 101 (D.D.C. 2017); and *Ktunaxa Nation v. British Columbia*, 2 S.C.R. 386 (2017). In the extractive industries context, some sources indicate that work stoppages can cost upwards of \$1 million per day.

Annex

Expert Mechanism advice No. 11 on indigenous peoples and free, prior and informed consent

1. The United Nations is an important venue for facilitating free, prior and informed consent in negotiations with States. To the extent that United Nations system organizations, including the United Nations Development Programme, the United Nations Educational, Scientific and Cultural Organization, the World Bank, the World Health Organization and the World Intellectual Property Organization (WIPO), encounter indigenous peoples' issues, they are advised that the human rights expressed in the Declaration apply broadly in all of these settings. In particular, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources is currently in the process of negotiating several multilateral instruments on traditional knowledge, genetic resources, traditional cultural expressions and other forms of intellectual and cultural property. In the negotiation and drafting of these instruments, WIPO and Member States should reference the Declaration, and especially the norm of free, prior and informed consent, with respect to the ownership, use and protection of indigenous peoples' intellectual property and other resources.
2. States should observe a human rights approach to free, prior and informed consent, among others by promoting capacity-building for State authorities and officials, including judges and lawmakers. Because local and subnational level authorities are in many cases closer and more sensitive to indigenous issues, local officials and company employees should receive better instructions on free, prior and informed consent.
3. States should establish an appropriate regulatory mechanism or mechanisms at the national level, preferably at the constitutional or legislative level, to regulate consultations in situations where free, prior and informed consent is required or is sought as the objective of the consultation. It should include references to the Declaration. The establishment of such a mechanism itself necessitates a process of consultation with indigenous peoples in a context of trust and good faith, and should be accompanied by the development of adequate implementing institutions, employing well-trained officials and ensuring adequate funding. Such a mechanism could also act as an oversight mechanism.
4. States should engage directly with indigenous peoples. When direct negotiations between indigenous peoples and private enterprises are sought by indigenous peoples themselves, companies must exercise due diligence to ensure the adequacy of the consultation procedures. States remain responsible for any inadequacy and should ensure measures are in place to oversee and evaluate procedures undertaken by business enterprises, which could include legislation or guidelines requiring the operationalization of free, prior and informed consent and penalizing corporations for failing to comply with such consent.
5. States should establish preconditions for achieving effective free, prior and informed consent, including building trust, good faith, culturally appropriate methods of negotiation and recognition and respect for indigenous peoples' inherent rights. The process should be formal and carried out with mutual respect.
6. States should ensure that consent is always the objective of consultations, bearing in mind that in certain cases consent will be required. Consultations should start at the planning phase (i.e., prior to the State or enterprise committing to undertake a particular project or adopting a particular measure, such as the licensing of a project) so indigenous peoples can influence final decisions. The measures to be consulted on should be clear. Consultations should occur throughout the evolution of the project, entailing "constant communication between the parties"¹ and should not be confused with public hearings for environment and regulatory statutes.

¹ *Saramaka* case, para. 133.

7. States should ensure that all information, including about the potential impact of the project or measure, is provided to indigenous peoples and is presented in a manner and form that is understandable to them, culturally appropriate, in accordance with their inherent traditions and independent. If necessary, it should also be presented orally and in indigenous languages.
8. States should ensure that there is institutional capacity and political will within the organs of the State to understand the meaning of and process to seek and obtain free, prior and informed consent, including by respecting existing indigenous protocols.
9. States should ensure that indigenous peoples have the resources and capacity to effectively engage in consultation processes by supporting the development of their own institutions, while not compromising the independence of those institutions. States and the private sector should promote and respect indigenous peoples' own protocols, as an essential means of preparing the State, third parties and indigenous peoples to enter into consultation and cooperation, and for the smooth running of the consultations.
10. States should ensure equality throughout the process and that the issue of the imbalance of power between the State and indigenous peoples is addressed and mitigated, for example employing independent facilitators for consultations and establishing funding mechanisms that allow indigenous peoples to have access to independent technical assistance and advice.
11. States should engage broadly with all potentially impacted indigenous peoples, consulting with them through their own representative decision-making institutions, in which they are encouraged to include women, children, youth and persons with disabilities, and bearing in mind that the governance structures of some indigenous communities may be male dominated. During each consultation, efforts should be made to understand the specific impacts on indigenous women, children, youth and persons with disabilities.
12. States should ensure that the free, prior and informed consent process supports consensus building within the indigenous peoples' community, and practices that might cause division should be avoided, including when indigenous peoples are in situations of vulnerability like economic duress. Special attention should be given in this regard to indigenous peoples representing distinct sectors in the community, including dispersed communities and indigenous peoples no longer in possession of land or who have moved to urban areas.
13. States should ensure that if indigenous peoples are in voluntary isolation no activities impacting on their rights should be considered. Where interventions related to those peoples are necessary to ensure their well-being or are unavoidable the appropriate United Nations and regional safeguards should be adhered to.
14. Indigenous peoples are encouraged to establish robust representative mechanisms and laws, customs and protocols for free, prior and informed consent. At the start of a consultation process indigenous peoples should agree on and make clear how they will make a collective decision, including the threshold to indicate when there is consent (see A/HRC/21/55).
15. States should ensure that indigenous peoples have the opportunity to participate in impact assessment processes (human rights, environmental, cultural and social), which should be undertaken prior to the proposal. Such impact assessments should be objective and impartial.
16. States should prevent measures or projects that may cause significant harm to indigenous people, including cumulative harm from competing land-use forms.
17. States should consult and cooperate with indigenous peoples to establish procedures to regulate, verify and monitor the consultation process, to ensure that the State consults and cooperates to obtain free, prior and informed consent, and if consent is required, that it is received.
18. States should ensure that treaties and other constructive agreements and arrangements recognizing the jurisdiction or decision-making authority of indigenous peoples are upheld and enforced.

19. States that have ratified Indigenous and Tribal Peoples Convention, 1989 (No. 169) should interpret and apply its provisions on consultation and free, prior and informed consent in accordance with other relevant standards, notably the United Nations Declaration on the Rights of Indigenous Peoples and emerging jurisprudence, including by regional human rights mechanisms.

20. States should ensure that, when relevant, indigenous peoples are provided with redress, which may include restitution, and that indigenous peoples are able to make their own decision about the form of redress best able to restore and protect their rights. This could be provided through culturally appropriate redress mechanisms, taking into account customary laws. States should not limit redress to cash compensation or arbitrarily exclude the potential for return or restoration of lands. Compensation should as far as possible take the form of lands and territories.²

21. States should ensure that indigenous peoples who have unwillingly lost possession of their lands, or whose lands have been confiscated, taken, occupied or damaged without their free, prior and informed consent, are entitled to restitution or other appropriate redress (Declaration, art. 28). If direct financial benefits in the form of compensation are agreed upon for any adverse effects caused by the project, they should accrue to indigenous peoples irrespective of whether or not they own the land or resources. This may require amendments to legislation.

22. States should ensure that any consent agreements are in writing and include, inter alia, provisions on impact mitigation, compensation and an equitable distribution of the benefits from the project; joint management arrangements; grievance procedures; and a dispute regulation mechanism with equal capacity of both sides. Access to justice for claims by indigenous peoples should be guaranteed.

23. States should facilitate and support processes to draw up long-term development plans in collaboration and cooperation with indigenous peoples, including national action plans, as committed to by States in the Declaration at the World Conference on Indigenous Peoples.³

² Committee on the Elimination of Racial Discrimination, general recommendation No. 23.

³ See General Assembly resolution 69/2.

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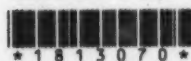
Human rights situations that require the Council's attention**Report of the Commission of Inquiry on Burundi****Summary*

The Commission of Inquiry on Burundi found that the serious human rights violations documented in the first year of its mandate, including crimes against humanity, have persisted in 2017 and 2018. Such violations include cases of summary execution, enforced disappearance, arbitrary arrest and detention, torture and other cruel, inhuman or degrading treatment, sexual violence, and violations of civil liberties such as the freedoms of expression, association, assembly and movement (see A/HRC/36/54 and A/HRC/36/54/Corr.1).

While the State entities that are most often implicated in these violations continue to be the National Intelligence Service and the police, the Commission is concerned about the growing role being played by members of the ruling party's youth league, the Imbonerakure, in a situation in which recruitment drives among the general public are being used as a means of suppressing all opposition. The perpetrators of the violations are operating in a climate of impunity perpetuated by the lack of an independent judiciary.

The political crisis in Burundi has had a very negative impact on the country's economic and social situation and has fuelled an increase in poverty. The Government has nonetheless imposed additional taxes and contributions, in contravention of the right of all persons to an adequate standard of living, and has failed to devote the greatest possible share of its domestic resources to the realization of economic and social rights.

* The annexes to the present document are being circulated as received, in the language of submission only.



Contents

	<i>Page</i>
I. Introduction	3
A. Mandate	3
B. Cooperation by Burundi with the Commission	3
C. Methodology	3
D. Applicable law	4
II. Human rights situation	4
A. Main trends	4
B. Responsibility	5
C. Violations of civil and political rights	8
D. Violations of economic and social rights	12
E. Dysfunction in the judicial system	13
III. International crimes	14
A. Constituent elements and types of crimes	14
B. Individual responsibility	15
IV. Measures to protect civilians and prevent the recurrence of conflict	15
V. Conclusions and recommendations	16
Annexes	21
I. Map of Burundi	21
II. Correspondence with the Government of Burundi	22

I. Introduction

A. Mandate

1. The Commission of Inquiry on Burundi was created by Human Rights Council resolution 33/24, adopted on 30 September 2016, to conduct a thorough investigation into human rights violations and abuses in Burundi since April 2015, to determine whether any of them may constitute international crimes, to identify their alleged perpetrators and to formulate recommendations for ensuring that such perpetrators "are held accountable for their acts". By its resolution 36/19, adopted on 29 September 2017, the Council extended the Commission's mandate without modification for one year.

2. In 2018, the Commission placed special emphasis on the violations and abuses committed since 2017 in order to highlight developments in the situation as compared to the one prevailing in 2015 and 2016. The Commission also focused more closely on economic and social rights and the functioning of the judicial system.

3. On 1 February 2018, Mr. Doudou Diène of Senegal was appointed to chair the Commission following the resignation of the previous Chair, Mr. Fatsah Ouguergouz. On 5 March 2018, Ms. Lucy Asuagbor of Cameroon was appointed to serve as a member of the Commission to replace Ms. Reine Alapini Gansou, who was elected to the International Criminal Court. Ms. Françoise Hampson of the United Kingdom of Great Britain and Northern Ireland continued to serve as a member of the Commission, as she has done since its inception.

4. The Commission presented two oral briefings to the Human Rights Council, at the Council's thirty-seventh and thirty-eighth sessions. The present report summarizes the final conclusions of its investigations, which will be detailed in a separate document.¹

B. Cooperation by Burundi with the Commission

5. By its resolution 36/19, the Human Rights Council urged the Government of Burundi to cooperate fully with the Commission of Inquiry, to authorize it to conduct visits to the country and to provide it with all the information necessary to fulfil its mandate. To this end, the Commission sent six letters to the Permanent Mission of Burundi in Geneva and one letter to the Minister for Foreign Affairs and International Cooperation (annex II). It called on the Burundian authorities, including during its oral briefings to the Human Rights Council, to grant it access to Burundi and to share information on the human rights situation in the country, including information concerning attacks on agents of the State and members of the ruling party. As in the past, these requests have gone unanswered. The Burundian authorities have consistently disputed the content of the Commission's briefings and reports and have taken a hostile attitude towards the Commission, threatening twice to take legal action against its members. The United Nations High Commissioner for Human Rights has condemned this threat as being contrary to the 1946 Convention on the Privileges and Immunities of the United Nations.

C. Methodology

6. During the current mandate period, the Commission visited Belgium, Uganda, the Democratic Republic of the Congo, Rwanda and the United Republic of Tanzania. It also conducted a mission to Ethiopia to meet with representatives of the African Union. Through these visits and numerous remote contacts, in particular with individuals living in Burundi, the Commission conducted more than 400 interviews with victims, witnesses and

¹ That document (A/HRC/39/CRP.1) will be available shortly on the website of the Human Rights Council and the Commission of Inquiry on Burundi (www.ohchr.org/EN/HRBodies/HRC/IBurundi/Pages/ColBurundi.aspx).

other sources. These are in addition to the 500 interviews conducted and the testimonies gathered during its initial mandate period.

7. As it had done for its previous report (A/HRC/36/54 and A/HRC/36/54/Corr.1), the Commission adopted the same standard of proof as most other commissions of inquiry on human rights, namely "reasonable grounds to believe". It therefore took care to collect a body of reliable and consistent information on the basis of which a reasonable and ordinarily prudent person would have reason to believe that an incident or pattern of conduct had occurred.

D. Applicable law

8. The law applicable to the work of the Commission, namely international human rights law and international criminal law, has also remained the same (see A/HRC/36/54, paras. 9 and 10). Over the past year, there have been no new developments pointing to the existence of an armed conflict to which the rules of international humanitarian law would apply. Having decided to place greater emphasis on economic and social rights, the Commission based its legal analyses on the relevant instruments to which Burundi is a party.²

9. Burundi remains a party to the Convention on the Prevention and Punishment of the Crime of Genocide, but it ceased to be a party to the Rome Statute of the International Criminal Court on 27 October 2017. The country's withdrawal from the Rome Statute does not, however, discharge it from the obligations arising therefrom while it was a party to this treaty.³ Accordingly, on 25 October 2017, Pre-Trial Chamber III of the International Criminal Court authorized the Prosecutor of the Court to open an investigation into crimes committed in Burundi between 26 April 2015 and 26 October 2017. The Commission has continued to refer to the definitions of crimes provided by the Rome Statute, which are reflected in the Criminal Code of Burundi.

II. Human rights situation

A. Main trends

10. The Commission found that the main human rights violations documented since the political crisis began in April 2015, namely cases of summary execution, disappearance and enforced disappearance, arbitrary arrest and detention, torture and ill-treatment, and sexual violence, have persisted in 2017 and 2018. As in the past, most of the victims of these violations are opponents of the Government and/or of the ruling party (the Conseil national pour la défense de la démocratie-Forces pour la défense de la démocratie (CNDD-FDD)) or persons who are perceived as such, including members of opposition political parties (particularly the Forces nationales de libération, led by Agathon Rwasa, and the Mouvement pour la solidarité et la démocratie); supporters of armed opposition groups; Burundians trying to flee the country and therefore suspected of joining such groups; or journalists or members of civil society organizations.

11. The violations have had lasting psychological and physical effects on the victims. Those that have been committed primarily against men, including enforced disappearance and summary execution, have had multiple consequences for the victims' families. In addition to the impact of losing a spouse, wives often face harassment, threats or violence on the part of the alleged perpetrators and are unable to meet the basic needs of their families.

12. Before and during the campaign to amend the Constitution, CNDD-FDD and its youth league, the Imbonerakure, stepped up their efforts to recruit members from among

² See A/HRC/39/CRP.1.

³ Rome Statute, art. 127.

the general public. These efforts focused in particular on Burundians — even those who were apolitical — who had refused or been unable to register to vote and on those who had not paid their contribution for the 2020 elections. These trends are further limiting freedom of expression in a country whose main independent media outlets and human rights organizations have been banned. Those that continue to operate in the country have been subjected to restrictions, threats and persecution.

13. This climate of disregard for human rights continues to be fomented by repeated instances in which hatred and violence have been advocated by the authorities, including the Head of State and members of CNDD-FDD, and by an overall context of impunity exacerbated by the lack of an independent and properly functioning judicial system, as well as a lack of public trust in the latter. This environment has also had a direct impact on the enjoyment of economic and social rights, given that a growing share of the population has unmet needs, primarily in the areas of health, nutrition, water, hygiene and sanitation, as a result of increased financial pressure from the authorities and CNDD-FDD. Whereas Burundi was formerly a developing country, it is now once again in a state of humanitarian emergency. In some cases Burundians are deprived of their rights, such as the right to education, for political reasons.

14. The number of Burundian refugees increased steadily until 31 March 2018, reaching nearly 431,000; it then began to decline. The number today is estimated at 394,778, accounting for 3.7 per cent of the Burundian population.⁴ The Commission met with persons recently granted refugee status who reported that checkpoints, in particular those set up by Imbonerakure, have been stepped up at the country's borders. In some cases, human rights violations have been committed against individuals who were trying to flee or who had returned to Burundi. Some of these persons have gone back into exile without necessarily being registered in the host country.

B. Responsibility

1. Responsibility of the Burundian State

15. States have a threefold obligation to respect, protect and fulfil human rights, including both civil and political rights and economic and social rights.

(a) Obligation to respect

16. The obligation to respect human rights requires States, their agents and persons acting under their control to refrain from actively violating the rights of individuals.

(i) Responsibility of the State for the conduct of its organs

17. The Commission found that members of the National Intelligence Service and the police, including high-ranking officials, were involved in the commission of a large number of human rights violations in 2017 and 2018. Administrative authorities have also committed or ordered the commission of human rights violations, including arbitrary arrest and detention and ill-treatment.

18. New testimonies, including from former State and security officials, have confirmed the central role being played by an informal structure surrounding the Head of State, often referred to as the "committee of generals", that includes State officials such as the Minister of Public Security, the Administrator-General of the National Intelligence Service, the heads of the President's civil cabinet and office of police affairs, and the Secretary-General of CNDD-FDD. This structure sets the policy on political and security issues, including the measures to be taken in relation to opponents. It transmits its orders and directives through a parallel hierarchy and chains of command based on a network of personal loyalties, some of which date back to the time of the rebellion, whose composition varies from one province or locality to another. The workings of this structure always involve more or less

⁴ Office of the United Nations High Commissioner for Refugees, 30 June 2018. See <https://data2.unhcr.org/en/situations/burundi>.

high-ranking officials of the National Intelligence Service, the police, the army, the administration and CNDD-FDD. In this regard, organs of the State are often indistinguishable from organs of the ruling party.

19. The Government has imposed additional taxes and contributions, including for the 2020 elections (see para. 57), and has thereby exacerbated poverty and violated the obligation of the State to take appropriate measures to ensure that all persons have an adequate standard of living for themselves and their families.⁵ Discrimination by State agents based on whether or not individuals belong to CNDD-FDD has had an impact on specific rights, such as the right to education, and on employment in the civil service and in public and public-private enterprises.

(ii) *Responsibility of the State for the conduct of the Imbonerakure*

20. The information gathered, in particular from former members of the Imbonerakure and CNDD-FDD, confirms that the role of the Imbonerakure is growing in an overall context of recruitment among the general public and persecution of political opponents and persons perceived as such. The referendum campaign has given rise to numerous violations by Imbonerakure, who, acting either alone or in the presence of law enforcement officers, conduct checks to verify whether persons of voting age have registered and whether they have paid their contributions for the 2020 elections. These checks have often served as a pretext for extortion and theft. Forced recruitment into the Imbonerakure has also reportedly been stepped up.

21. The increase in these activities and the wider latitude being left to the Imbonerakure demonstrate their collusion with formal and informal structures of State repression (see para. 18). The fact that the Imbonerakure are members of the "joint human security committees", along with representatives of the administration and the police, indicates that they are acknowledged to play a role in the security apparatus. With the consent of local governments, Imbonerakure have been used as auxiliaries or substitutes for law enforcement in the country's interior, where such forces have a reduced presence. Some testimonies have even indicated that police operations against opponents have been led by Imbonerakure.

22. The Commission is thus in a position to establish the responsibility of the Burundian State for wrongful acts committed by Imbonerakure in four contexts: when their conduct is acknowledged and adopted by agents of the State,⁶ when they act on the instructions or under the direction of the latter,⁷ and when they act in "complete dependence" on or under the "effective control" of such agents.

23. Imbonerakure have continued to make arrests on their own initiative, often with violence, and to hand over the persons apprehended to the police or the National Intelligence Service. The detention of such persons by law enforcement shows that the latter have adopted the conduct of such Imbonerakure. This acknowledgement is also demonstrated by the fact that no measures have been taken to put a stop to such conduct.

24. Imbonerakure have continued to act on the orders of officials, including high-ranking officials, of the National Intelligence Service, the police and the Office of the President. Some have taken part in law enforcement operations or operations against opponents, acting alongside police or intelligence officers and in some cases wearing the same uniforms or carrying the same weapons as the defence and security forces. Such conduct by Imbonerakure has even taken place in prisons, such as the Mpimba prison in Bujumbura, and in police holding cells.

25. The growing role and freedom of action of the Imbonerakure are entirely dependent on the discretion of State power structures and on the impunity accorded by the latter. To demonstrate the "complete dependence" of an organization on the State, international

⁵ International Covenant on Economic, Social and Cultural Rights, art. 11.

⁶ International Law Commission, articles on responsibility of States for internationally wrongful acts, art. 11.

⁷ Ibid., art. 8.

jurisprudence nonetheless requires the existence of a particularly great degree of control, as shown, for example, by the provision of considerable military and financial support and systematic alignment with State policy.⁸ In this connection, witness statements confirm that a group of demobilized soldiers, subsequently joined by Imbonerakure, was created in 2006 and has since been trained, armed and remunerated by the former Administrator-General of the National Intelligence Service. Following the killing of that official in 2015, the group was supplemented by new members selected and used by officials of the National Intelligence Service, the police and the army to conduct operations, including summary executions and targeted disappearances. On the basis of this information, the Commission is of the view that the group is acting in complete dependence on the Burundian State.

26. The Commission remains convinced that the Imbonerakure often operate under the "effective control" of the Burundian State. International jurisprudence requires that such control be demonstrated in each case through the planning and organization of operations, the issuance of orders or the provision of equipment by the State.⁹ Several witness statements attest to that level of control during operations carried out by Imbonerakure.

27. However, to date, international judges have issued rulings only in cases involving entities acting outside the territory of the State in question. In such cases, the State must have exercised direct control in order to be held accountable. The Imbonerakure, however, are committing wrongful acts on Burundian territory. The State thus has more means at its disposal, in particular of a legislative, judicial and financial nature, for putting an end to their activities or, on the contrary, for promoting them through its action or deliberate inaction. It is therefore in a position to exercise overall effective control over the Imbonerakure. Given that the Imbonerakure have been involved in a wide range of activities, including some within the purview of the Government; have in a number of cases acted autonomously but with a freedom of action afforded by the authorities; and have continued to enjoy near-total impunity, the Commission is of the view that the Burundian State is responsible for the wrongful acts committed by the Imbonerakure, since it exercises overall effective control. Therefore, under international law, the Burundian State may be held accountable for all of the human rights violations attributable to the Imbonerakure.

(b) Obligation to protect

28. The State has a duty to protect the human rights of persons under its jurisdiction, in particular when it knows or should have known of violations or abuses committed by third parties. By allowing its agents and/or Imbonerakure who are responsible for such acts to go unpunished, including by not conducting investigations or initiating proceedings against them, the Burundian State is failing to meet its obligation to protect. By not taking action to combat impunity and not undertaking a thorough reform of its judicial system (see paras. 62–65), the Burundian State is encouraging the repeated commission of human rights violations and abuses.

(c) Obligation to fulfil

29. Article 2 of the International Covenant on Economic, Social and Cultural Rights requires States parties to take steps to the maximum of their available resources with a view to achieving progressively the full realization of the rights recognized therein. The fact that international assistance to Burundi has decreased since 2015 as a result of violations of civil and political rights does not relieve the Burundian State of its obligation to devote the maximum of its available resources to the realization of economic and social rights. Yet the Commission has noted that the country's domestic resources are oriented more towards defence and security expenditures and that there are many exemptions. The Commission has also received information on the misappropriation and seizure of public property by

⁸ International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007.

⁹ Ibid.; see also International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986.

senior officials (see para. 60) in a country that is experiencing a humanitarian crisis and in which much of the population is unable to enjoy the right to food.

2. Responsibility of armed groups and opposition political parties

30. The existence of armed groups at the border continues to pose a threat to the country's civilian population. To the Commission's knowledge, none of these groups claimed responsibility for an attack on Burundian soil in 2017 or 2018. Because the Commission has not had access to victims and the Government has repeatedly refused to hand over evidence, the Commission has been unable to corroborate the information it has received on the involvement of armed groups in human rights violations in Burundi since 2015. In particular, it has not been able to identify the group responsible for the killing of at least 24 people on 11 May 2018 in the district (*commune*) of Buganda, Province of Cibitoke. The findings of the investigation carried out by the Burundian authorities have not yet been released.

31. The Commission noted that on 3 and 5 April 2018, a call to arms via Twitter and Facebook was issued by Jérémie Minani, a member of the governing body of the National Council for the Restoration of the Arusha Peace and Reconciliation Agreement for Burundi, the Constitution and the Rule of Law, which is a platform for opposition political parties in exile. On 8 June 2018, the Civic Forum of Burundi issued a statement, signed by the President of the Council and representatives of civil society organizations in exile, calling for a "revolution" by the Burundian people. While the statement cannot be described as a clear incitement to armed conflict, the use of revolutionary language nevertheless raises the possibility of recourse to violence.

C. Violations of civil and political rights

1. Right to life

(a) Summary execution

32. While summary executions were not found to have taken place on a large scale, as occurred in 2015, several witness statements attest to the persistence of such violations, primarily against persons who belonged or were suspected of belonging to the opposition, in particular when such persons refused to join CNDD-FDD, to register to vote in the referendum or to pay contributions.

33. Most of those alleged to have perpetrated summary executions since 2017 have been members of the National Intelligence Service, the police or the Imbonerakure. Members of the Imbonerakure have acted either alone or in conjunction with the security forces, or under the supervision of the latter.

34. The practice of concealing the bodies, including by weighing them down with stones and throwing them into watercourses or by transporting them from one province or district to another in order to make them harder to identify, has persisted. It also continues to be the case that when bodies are found, they are simply buried and no investigation is conducted.

(b) Enforced disappearance

35. The phenomenon of arbitrary arrest and detention, including in secret locations, the concealment of bodies and the impunity prevailing in the country have continued to create a climate of secrecy that is conducive to cases of disappearance. This secrecy is exacerbated by the restrictions imposed on independent journalists and civil society organizations and by victims' reluctance to file complaints for fear of reprisals. According to some testimonies, individuals have disappeared following night-time raids on their homes carried out by Imbonerakure. Cases of disappearance also continue to be attributed to officers of the National Intelligence Service and the police.

36. At this stage of its investigations, the Commission has reasonable grounds to believe that Léopold Habarugira, an official of the opposition party Union pour la paix et le développement-Zigamibanga, who was arrested on 12 September 2017 by a group of

individuals including at least one person wearing a police uniform, has been a victim of enforced disappearance.¹⁰ The same appears to be true of Mouvement pour la solidarité et la démocratie members Bonaventure Havyarimana, Égide Habonimana, Lionel Hafashimana, Bénéus Mbanenimanga and Emmanuel Nyabenda, who were arrested in Bujumbura on 2 March 2018 by officers of the National Intelligence Service. The twins Bukuru and Butoyi Shabani, who were arrested in November 2016, and Évariste Nyandwi, alias Matwi, who was arrested in December 2016, were detained in a house in Bujumbura that was used by the National Intelligence Service as a secret place of detention. It is alleged that they were subsequently executed by members of the National Intelligence Service. The Commission has also gathered information on other cases in which it has reason to fear that enforced disappearances have taken place.¹¹

2. Right to liberty and security of person

37. Cases of arbitrary arrest and detention have continued to be perpetrated. Most such cases have targeted persons affiliated with opposition political parties or opposition armed groups or persons perceived as such, as well as persons who did not register to vote or who called on voters to reject the constitutional amendment. Members of the former Burundian Armed Forces ("ex-FAB") and persons trying to flee the country have also been targeted, as have persons — even those who were apolitical — who refused to join CNDD-FDD or the Imbonerakure.

38. Arrests continue to be carried out by police officers, members of the National Intelligence Service and administrative authorities. Collective arrests are sometimes made in the wake of security incidents or in the case of political opponents. Imbonerakure act in the presence of police officers and/or local authorities, or on their own initiative, before handing the arrested persons over to the police. It is clear that these acts are arbitrary because the Imbonerakure are not legally authorized to carry out arrests,¹² the victims are not informed of the reasons for their arrest and the arrests are conducted without a warrant and, in some cases, in a violent manner.

39. Signs of arbitrary detention include the absence of a legal basis or the misuse of vague descriptions such as "undermining the internal security of the State", prolonged detention without the possibility of appeal, failure to inform the detainee's relatives and lack of access to legal counsel. Relatives of persons wanted by the authorities have been detained or threatened with arrest. Some individuals have been detained in police holding cells before being taken to the National Intelligence Service or the Special Investigation Brigade. Testimonies concerning detention in unofficial places have also been obtained, as well as information on the use of police holding cells to detain Imbonerakure for internal disciplinary purposes.

40. The same arbitrariness continues to be observed with regard to release from custody. Some individuals have been released for no apparent reason, others because they knew someone within the State apparatus and still others in exchange for what have sometimes amounted to large sums of money. Some individuals who were freed upon acquittal or presidential pardon have been rearrested or subjected to death threats, or are being sought by State agents or Imbonerakure. In addition, some persons who were sentenced for political reasons have been kept in detention even after they had been exonerated or had completed the term of their sentence.

3. Torture and other cruel, inhuman or degrading treatment

41. Cases of torture and ill-treatment have persisted. While some of these acts have been committed by officers of the National Intelligence Service and the police, the majority have

¹⁰ See the definition of "enforced disappearance" in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.

¹¹ In these cases, some but not all elements of the definition of "enforced disappearance" are present. For further details, see A/HRC/36/54, para. 38; see also A/HRC/36/CRP.1 and A/HRC/39/CRP.1.

¹² Unless the person is arrested *in flagrante delicto*.

been committed by Imbonerakure acting alone, sometimes with the assistance or in the presence of police officers.

42. Most of the victims in these cases have been young men who were, or were perceived to be, sympathizers or members of opposition political parties and who refused to join the ranks of CNDD-FDD or the Imbonerakure, or who were accused of joining armed groups when they were trying to flee the country. Persons who had refused to register to vote or who were suspected of calling on voters to reject the constitutional amendment were targeted during the referendum campaign. In some cases, women have been subjected to ill-treatment by Imbonerakure who were looking for a member of their family.

43. Most such acts of torture and ill-treatment have occurred in places of detention: police or National Intelligence Service holding cells, the Mpimba central prison in Bujumbura and unofficial places of detention such as private homes. There have also been cases in which the acts occurred in public places, such as streets or fields. Some victims were beaten or kicked on different parts of their bodies or were hit with stones, sticks, rods, metal bars or rifle butts, or were attacked with sharp objects such as machetes or knives. Some victims were burned with heated metal rods, and some were tied up or handcuffed. In a number of cases, acts of torture were accompanied by threats, including death threats, intimidation and verbal abuse, sometimes of an ethnically charged nature.

44. Several victims described conditions of detention in prisons and police cells that constitute cruel, inhuman or degrading treatment, including overcrowding in cells, unhealthy conditions and lack of food, water and medical care.

4. Sexual violence

45. The Commission documented numerous cases of sexual violence. The majority of the victims are women, targeted because they or their spouses belonged or were thought to belong to the opposition or because they refused to join the ranks of CNDD-FDD or the Imbonerakure, sometimes out of a desire to remain apolitical. Most of the perpetrators were Imbonerakure or other men who implied that they were acting on behalf of CNDD-FDD. In most of the cases, the women were raped by one or several men during attacks on their homes, which often took place at night. The rapes were often accompanied by other types of physical violence against the victims and, in some cases, against other members of the household. The perpetrators sometimes made death threats or ethnically charged remarks. These acts, especially those committed for a specific purpose such as intimidation or punishment because of the victim's assumed political affiliation, constitute acts of torture.

46. In the context of detention, men have also been victims of sexual violence, including cases of forced nudity and violence on the genital area. Such violence, which constitutes torture, has taken place *inter alia* in National Intelligence Service cells. Sexual violence has been perpetrated by police or National Intelligence Service officers, generally against persons suspected of belonging to or supporting armed groups.

47. The fact that the victims often have not had access to appropriate health care has exacerbated the consequences of sexual violence. Most of the victims have not filed complaints because they were afraid of being stigmatized, did not have access to justice or did not trust that effective measures would be taken against State agents or perpetrators linked to CNDD-FDD. Several women who had been victims of sexual violence said that they had informed the local authorities but that the latter had not taken any action. The persistence of multiple forms of discrimination against women in Burundi is conducive to sexual violence.

5. Civil liberties

(a) Freedom of expression

48. Most of the violations and restrictions that have been documented, particularly in the context of the referendum campaign, have curtailed the freedom of expression. With regard to the media, the National Communication Council, whose powers and subordination to the executive branch were reinforced by an organization act adopted in March 2018, has tightened its control over the media and journalists. In September 2017, the National

Communication Council revoked the licences of about a dozen media outlets, including Radio publique africaine, Radio Bonesha FM and Radio-Télévision Renaissance, all of which have been shut down since May 2015. The Council has also ordered a number of suspensions. For example, it suspended radio broadcasts by the Chamber of Commerce and Industry in October 2017 and broadcasts by the British Broadcasting Corporation (BBC)¹³ and Voice of America in May 2018, and has suspended certain sections of the online newspapers *Iwacu* and *Le Renouveau*. Many independent journalists remain in exile. Others have gone into exile in 2018, and those who are still working in Burundi continue to be subjected to pressure, intimidation and restrictions on the part of local authorities, the National Intelligence Service and Imbonerakure.

49. The Commission remains concerned about the frequent instances of incitement to hostility or violence, which contravene article 20 of the International Covenant on Civil and Political Rights. In particular, certain speeches made by the Head of State — especially those of 18 November 2017, 12 December 2017 and 2 May 2018 — have threatened opponents both within and outside CNDD-FDD. These speeches were echoed across the country by local authorities and members of the ruling party. Melchiade Nzopfabarushu, a former Chef de Cabinet in the Office of the President, was convicted at first instance of having made remarks amounting to hate speech in April 2018, but his sentence was significantly reduced on appeal and he has since been released. Other individuals who have publicly made similar remarks have gone unpunished. In addition, as in previous years, some Imbonerakure continue to chant militant and hateful slogans as a show of force.

(b) Freedoms of association and assembly

50. The situation of organizations whose authorizations have been suspended or revoked and whose accounts have been frozen has not changed. The Burundian authorities have not rescinded the international arrest warrants issued against the leaders of such organizations. The two laws adopted in January 2017 on Burundian non-profit organizations and foreign non-governmental organizations have limited those entities' freedom of association by considerably strengthening the authorities' control over their activities and resources. The Commission has continued to document arbitrary arrests, prosecutions and severe sentences against members of civil society organizations still operating in Burundi, as illustrated by the April 2018 sentencing of Germain Rukuki to 32 years' imprisonment following an unfair trial.

51. While the freedom of association is hampered in Burundi, its corollary, the freedom not to associate, is also restricted. Many witnesses have reported that local officials of CNDD-FDD and/or Imbonerakure have forced or attempted to force members of opposition parties and persons with no political affiliation to join those two organizations. This situation has given rise to threats, harassment, violence and, in some cases, killings or arbitrary arrests.

52. Members of opposition parties have also been subjected to pressure and restrictions that prevent them from holding public meetings, particularly in the context of the referendum campaign. Several people reported that they had been forced to participate in local meetings of CNDD-FDD.

(c) Freedom of movement

53. The Commission has noted that three types of interference with freedom of movement have persisted: the use of "household record booklets" to keep track of population movements; checkpoints in the vicinity of the country's borders; and cases of threats and harassment against persons whose family members have left Burundi. The inspection of "household record booklets", mainly by the police, has often given rise to extortion. Checkpoints near the borders have been stepped up and such checks are often carried out by Imbonerakure, sometimes in collaboration with the police. Cases of arbitrary arrest, ill-treatment, extortion and threats at the checkpoints have been reported.

¹³ BBC subsequently apologized to the Government of Burundi.

54. In 2017 and 2018, freedom of movement was also hampered by roadblocks throughout the country and checkpoints at the entrance to markets. Imbonerakure, sometimes in collaboration with local governments, turned away persons who could not show evidence that they had registered for the referendum or that they had paid contributions for the 2020 elections or other levies.

D. Violations of economic and social rights

55. Political crises in Burundi have long had a direct impact on the enjoyment of economic and social rights. The Arusha Agreement identifies the failure to satisfy the basic needs of citizens as one of the causes of violence in Burundi.¹⁴ The crisis that broke out in 2015 was no exception. In 2016, Burundi went from a developing country to a country in a state of humanitarian emergency.¹⁵ The United Nations Development Programme (UNDP), the International Monetary Fund (IMF) and the African Development Bank have all recorded zero or negative economic growth in Burundi since 2015. This reversal is taking place in a country where growth is structurally “low and volatile”¹⁶ owing to a lack of diversification of the economy, which is based primarily on an agricultural sector that is dominated by subsistence activities and dependent on the vagaries of exports and weather.

56. IMF noted that the country’s growth prospects for 2018 would remain weak owing to internal conflicts, political constraints and governance and security challenges, as well as high levels of public debt.¹⁷ Such debt, which has been rising again since 2015, reflects the burden of general expenditure by the State¹⁸ and the fact that the country’s international partners have continued to suspend direct budget support and to reduce their donations significantly on account of repeated human rights violations in Burundi.

57. In response to this situation, the Government turned to domestic debt, which has “exploded”¹⁹ since 2015, further weakening the economy. It has also introduced new taxes and duties and has increased existing ones. For example, taxes on sugar and on fuel and lubricants were raised by 33 per cent and 95 per cent, respectively, between 2015 and 2018. Added to this was the contribution “for the 2020 elections”, which was established extralegally in December 2017²⁰ and duplicates a provision in the State’s 2017 budget. This contribution, which is payable by civil servants, households and students of voting age, has in a number of cases been collected forcibly, in particular by Imbonerakure. This has led to cases of ill-treatment, arbitrary arrest and detention, threats, intimidation and persecution in the event that a person is unwilling or unable to pay.

58. These levies, together with various ad hoc contributions imposed at the local level, are impoverishing a population whose real per capita gross domestic product has shown negative growth since 2015²¹ and whose share of “non-poor” households was only 20.9 per cent prior to the crisis.²² Poverty is especially prevalent among households headed by women who are single, widowed or divorced.²³ The population’s access to goods, especially essential items imported from abroad, has been hindered by the rise in exchange rates and inflation since 2015. In the space of two years, the number of people “in need”,

¹⁴ Arusha Peace and Reconciliation Agreement for Burundi, protocol III, art. 2.

¹⁵ United Nations humanitarian country team.

¹⁶ UNDP, *Risques et vulnérabilités du développement humain de la République du Burundi*, Bujumbura, December 2016.

¹⁷ IMF, *Regional Economic Outlook: Sub-Saharan Africa. Fiscal Adjustment and Economic Diversification*, Washington, D.C., October 2017.

¹⁸ UNDP, *Risques et vulnérabilités* (see note 16).

¹⁹ Ibid.

²⁰ Ordinance No. 530/540/1772.

²¹ IMF, *Regional Economic Outlook* (see note 17).

²² *Cadre stratégique de croissance et de lutte contre la pauvreté, CSLP II: 2012–2015, Bilan de mise en œuvre*, UNDP, December 2016.

²³ World Bank, *Burundi Poverty Assessment*, November 2016.

mainly in terms of health care, food, water, hygiene and sanitation, increased from 1 million to 3.6 million, representing more than 34 per cent of the population.²⁴

59. Against this backdrop, the Government has not redirected its domestic resources to give priority to social spending, the demand for which has risen steadily in a country whose population of 10.5 million is likely to double by 2030.²⁵ On the contrary, a review of the annual State budgets shows that the amount of domestic resources devoted to defence and security expenditures has risen faster than the amounts allocated to basic services other than education. This situation has had a disproportionate impact on women because of their specific needs with regard to services, including health services, and because the lack of social services increases the burden of unpaid work borne by women within the family.²⁶

60. By way of example, the budgets allocated to the National Intelligence Service, the Special Brigade for the Protection of Institutions and the Unit for the Protection of Institutions (*Appui à la protection des institutions*), some of whose members have been identified by the Commission as being among the main perpetrators of human rights violations, were increased by 12 per cent, 13.3 per cent and 47.6 per cent, respectively, between 2015 and 2018, while the domestic resources provided to the Ministry of Agriculture and Livestock were reduced by 27.4 per cent.²⁷ What is more, corruption and misappropriation of public funds among high-level authorities are further depleting the resources that the State should be devoting to efforts to safeguard the rights of the population, especially with respect to food and health. Hundreds of people living with AIDS are going without treatment, owing in particular to the dire shortage of certain items in several of the country's hospitals.

61. Recruitment of the population has had a direct impact on the economic and social rights of individuals, including in schools, universities and professional circles. Some teachers and students have been pressured or have been removed from their schools because they refused to join CNDD-FDD, to pay the contribution for the 2020 elections or to attend information meetings about the constitutional amendment. Others have had to leave the country. Hiring decisions in the civil service and in public-private enterprises have been dictated by whether or not the applicant belongs to CNDD-FDD. Trade unions that are not affiliated with the majority party have come under threat and have difficulty operating.

E. Dysfunction in the judicial system

62. An in-depth study of the judicial system²⁸ has confirmed the long-standing lack of judicial independence in Burundi, as the executive branch exercises institutional control over judges and courts through its control of the Judicial Service Commission; most courts' budgets are managed by the Government; judges are appointed and promoted in an arbitrary manner; the principle that judges should have security of tenure is absent; and judges are inadequately paid, creating a situation that is conducive to corruption. Furthermore, the judicial system in Burundi does not have enough resources to function properly, despite the recent construction and rehabilitation of courtrooms.

63. At the operational level, the Commission found examples of dysfunction in all components of the criminal justice system. The executive branch frequently issues orders and otherwise interferes with politically sensitive cases, either to protect members of CNDD-FDD and the Imbonerakure by having them acquitted or released, or to have opponents of the Government convicted and imprisoned. The use of the broadly and vaguely defined offence of "undermining the internal security of the State" to prosecute opponents has given rise to abuses. Interference by the authorities is sometimes

²⁴ Humanitarian country team, *Aperçu des besoins humanitaires au Burundi 2018*, November 2017.

²⁵ According to the World Bank, the annual population growth rate now stands at 3.1 per cent.

²⁶ According to the World Bank, 90 per cent of the unpaid work done in Burundi is carried out by women; see World Bank, *Burundi Poverty Assessment* (see note 23).

²⁷ Calculated by the Commission.

²⁸ See A/HRC/39/CRP.1.

accompanied by threats, including threats against the physical integrity of judges, and by reprisals against judges if they do not follow instructions.

64. In cases involving political opponents, the rights of accused persons are routinely violated at both the pretrial and the trial stages through restrictions on such persons' access to counsel or obstruction of the work of counsel. The right to a defence is also adversely affected by the misuse of the *flagrante delicto* procedure, particularly in cases involving the offence of "undermining the internal security of the State", and the absence of an institutionalized system of legal aid. The Commission also received several testimonies indicating that lawyers have been subjected to intimidation.

65. The rules of criminal procedure are rarely observed: warrantless arrests of political opponents are routinely carried out, pretrial detention is illegally extended and judges use confessions made under torture as a basis for convicting defendants, over the objections of defence counsel. Court decisions ordering the release of defendants are not always respected. The inertia of the public prosecution service in most cases of human rights violations and the reluctance of victims to seek redress, either because they have no faith in the judicial system or because they have been threatened or intimidated, are impeding the implementation of the right to an effective remedy²⁹ and fostering impunity.

III. International crimes

A. Constituent elements and types of crimes

66. In view of the circumstances prevailing in 2017 and 2018, in particular the persistence of human rights violations, the Commission has reasonable grounds to believe that crimes against humanity continue to be committed in Burundi. The definition of such crimes in article 7 (1) of the Rome Statute as "acts ... committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" continues to apply.

67. The attack involves the multiple commission of acts against a population consisting primarily of civilians, pursuant to a State or organizational policy.³⁰ In Burundi, it continues to be the case that most of the victims are civilians, who are targeted mainly by the police, the National Intelligence Service and the Imbonerakure because of their real or perceived opposition to the Government and CNDD-FDD. The policy of the State is difficult to distinguish from that of the majority party, as both are pursuing the same goal of keeping CNDD-FDD and its leadership in power. The general public is regularly reminded of the aim of this policy, as demonstrated by recent speeches made by President Nkurunziza and statements made by representatives of CNDD-FDD at all levels, particularly in the context of the referendum campaign (see para. 49).

68. The number of violations found in several provinces since 2017 and the multiplicity of victims and perpetrators demonstrate the persistence of a widespread attack directed against the civilian population. The systematic nature of the attack is also demonstrable, given the existence of "patterns of crimes" constituting a "non-accidental repetition of similar criminal conduct on a regular basis".³¹

69. The attack continues to be carried out knowingly, as the perpetrators identified by the Commission necessarily have an understanding of the context for their actions by reason of their roles in the country's political and security apparatus, as well as their indoctrination within CNDD-FDD.

70. The Commission thus has reasonable grounds to believe that the crimes against humanity which it identified previously (see A/HRC/36/54, paras. 69–74, and

²⁹ International Covenant on Civil and Political Rights, art. 2.

³⁰ Rome Statute, art. 7 (2) (a).

³¹ International Criminal Court, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, decision of 30 September 2008.

A/HRC/36/54/Corr.1) continue to be committed in Burundi. These crimes include murder, imprisonment or other severe deprivation of physical liberty, torture, rape and other forms of sexual violence of comparable gravity, and persecution on political grounds. The Commission remains cautious about describing the disappearances it has documented as "enforced" within the meaning of this term under international criminal law, in view of the difficulty, at the current stage of its investigations, of proving all the elements required under the Rome Statute.³²

B. Individual responsibility

71. The Commission has supplemented the list of alleged perpetrators of crimes against humanity that it drew up during its initial mandate period, taking care to distinguish between direct responsibility and the responsibility of military commanders and superiors. The list remains confidential, in the interest of protecting the Commission's sources and respecting the principle of presumption of innocence. It will be turned over to the High Commissioner for Human Rights at the end of the Commission's mandate. In the meantime, the Commission reserves the right to share it.

IV. Measures to protect civilians and prevent the recurrence of conflict

72. In the light of the foregoing, there is an urgent need to put an end to the human rights violations and crimes against humanity which the Commission has reasonable grounds to believe are continuing to be committed in Burundi. This imperative arises from the responsibility to protect that lies first and foremost with the Burundian State, which must take the necessary measures to ensure respect for human rights and to prosecute the perpetrators of violations and abuses. It must also cooperate with the international human rights mechanisms established by the Human Rights Council. Priority must be given to the implementation of the recommendations made in January 2018 in the framework of the third universal periodic review of Burundi and to cooperation with all special procedures and treaty bodies that examine the situation in Burundi or request to visit the country.

73. In this regard, the Commission is concerned to note that, given the suspension since October 2016 of the headquarters agreement of the Office of the United Nations High Commissioner for Human Rights (OHCHR) office in Burundi; the limited deployment of African Union observers, whose ability to operate in the country is hampered by the absence of an agreement with the Government; and the Government's recent lack of cooperation in the implementation of Human Rights Council resolution 36/2, there are now no independent international mechanisms in Burundi that are in a position to investigate human rights violations. It is important for Burundi to reconsider its decision to withdraw from the Rome Statute of the International Criminal Court and to review the composition and functioning of the Independent National Human Rights Commission to ensure that that body respects the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles).

74. While putting an end to human rights violations remains a short-term imperative, in the longer term it is also important to consider measures for preventing such violations. An examination of the crisis that Burundi has been experiencing since 2015 reveals the root causes, which persist to this day. The Commission has identified three main factors behind the human rights crisis in Burundi: a narrowing of democratic space, especially since the 2010 elections; the incomplete and delayed implementation of the truth, justice and security sector reform measures set out in the Arusha Agreement; and the shortage of land and resources for a steadily increasing population.³³ In this context, the struggle for power is

³² International Criminal Court, *Elements of Crimes*, The Hague, 2011, p. 11. See also A/HRC/39/CRP.1.

³³ See A/HRC/39/CRP.1.

aimed at gaining and keeping control over these resources for the purpose of personal enrichment and to fund activities to counter all opposition.

75. It is disturbing to observe that the findings set out in 2000 in the Arusha Agreement still characterize the situation today. Article 4 of Protocol I to the Agreement describes the Burundi conflict as "fundamentally political" and as resulting from "a struggle by the political class to accede to and/or remain in power". It also identifies impunity, the lack of a sound development policy, failure to respect the principles of good governance and human rights and the "non-acceptance of peaceful coexistence, diversity and pluralism" as causes of violence and insecurity in Burundi.³⁴

76. In order to prevent the recurrence of conflict in Burundi, as analysed in the Arusha Agreement, the Commission wishes to highlight a number of measures that fall within its mandate. These measures, which are outlined in the recommendations below, concern steps to safeguard civil liberties; thoroughly reform the judicial system and, in the meantime, consider establishing an independent mechanism empowered to investigate human rights violations in Burundi and to try the alleged perpetrators; reform the security sector and establish credible civilian oversight mechanisms; give priority to maximizing the allocation of resources for improving the population's enjoyment of economic and social rights; and carry out reforms, particularly in the area of landownership, to safeguard the right to development.

V. Conclusions and recommendations

77. In the light of its investigations, the Commission of Inquiry on Burundi is in a position to conclude that the serious human rights violations documented in the first year of its mandate, including crimes against humanity, have persisted in 2017 and 2018. Such violations include cases of summary execution, disappearance (including enforced disappearance), arbitrary arrest and detention, torture and other cruel, inhuman or degrading treatment, sexual violence, and violations of civil liberties such as the freedoms of expression, association, assembly and movement (see A/HRC/36/54).

78. While the State entities that are most often implicated in these violations continue to be the National Intelligence Service and the police, the Commission is concerned about the growing role being played by the Imbonerakure in a situation in which recruitment drives among the general public are being used as a means of suppressing all opposition. The Burundian State is responsible for the violations committed by Imbonerakure in this context.

79. Perpetrators of violations are operating in an overall climate of impunity. The Commission has found that, as matters stand, the Burundian judicial system is both unwilling and unable to identify and prosecute those responsible for violations.

80. The political crisis in Burundi has had a very negative impact on the country's economic and social situation and has fuelled an increase in poverty. The Government has nonetheless imposed additional taxes and contributions, in contravention of the right of all persons to an adequate standard of living, and has failed to devote the greatest possible share of its domestic resources to the realization of economic and social rights.

81. In this context, the Commission continues to believe that the Arusha Agreement must remain the basis for any settlement of the crisis in Burundi. The Commission is especially concerned to note that there are no independent international mechanisms in Burundi that are in a position to investigate human rights violations.

82. As the Government of Burundi has not yet implemented the recommendations put forward by the Commission in its previous report (A/HRC/36/54), the

³⁴ Arusha Peace and Reconciliation Agreement for Burundi, protocol III, art. 2.

Commission reiterates those recommendations, in particular the ones contained in paragraphs 86, 87, 111, 112, 113, 114 and 115.

83. The Commission recommends that the Human Rights Council extend the mandate of the Commission for a period of one year, in view of:

- (a) The persistence of serious human rights violations and abuses;
- (b) The lack of action against perpetrators, especially the Imbonerakure, some members of which have continued to be used by State agents for activities contrary to human rights;
- (c) The lack of other international mechanisms in a position to carry out independent and thorough investigations into the human rights situation in Burundi.

84. The Commission also recommends that the Human Rights Council submit the report and recommendations of the Commission to the United Nations Security Council for its consideration.

85. The Commission recommends that the Government of Burundi take the following measures as a matter of priority:

- (a) Put an immediate end to the gross human rights violations being committed by agents of the State and Imbonerakure;
- (b) With the support of the international community, establish ad hoc mechanisms with a mandate to investigate human rights violations and to prosecute perpetrators of international crimes that are not being investigated by the International Criminal Court;
- (c) With the support of the international community, establish an independent body with a mandate to investigate the cases of disappearance reported since April 2015, locate potential mass graves, and exhume and identify the remains;
- (d) Take measures to ensure that victims of torture and women survivors of sexual violence have access to appropriate care, including free access to all sexual and reproductive health services and to psychological support;
- (e) Implement the Guidelines on Combating Sexual Violence and its Consequences in Africa adopted by the African Commission on Human and Peoples' Rights;
- (f) Control price increases, in particular by reviewing duty and tax increases that are undermining the population's right to an adequate standard of living and by abolishing contributions that disproportionately affect the poorest sectors;
- (g) Cooperate with international human rights mechanisms, in particular by:
 - (i) Resuming the practice of allowing special procedures mandate holders to conduct missions to Burundi;
 - (ii) Implementing the recommendations of the universal periodic review, treaty bodies and special procedures, including by establishing a national mechanism for reporting and follow-up;
- (h) Authorize the Office of the United Nations High Commissioner for Human Rights to resume all its activities in Burundi without hindrance;
- (i) Sign and implement the memorandum of understanding with the African Union and permit the full deployment of the 100 human rights observers provided for therein.

86. For the medium and longer terms, the Commission also recommends that the Government of Burundi:

(a) Amend the Organization Act of 8 March 2018 amending Act No. 01/03 of 24 January 2013 on the mandate, composition, organization and functioning of the National Communication Council with a view to ensuring the latter's independence;

(b) Ratify the International Convention for the Protection of All Persons from Enforced Disappearance;

(c) Amend the Code of Criminal Procedure to align its provisions with international standards, in particular the provisions on time limits for police custody and on oversight of detention, night-time and warrantless searches, the *flagrante delicto* procedure and the offence of "undermining the internal security of the State", and provisions that grant de jure impunity to judges and to officers of the criminal investigation police (*police judiciaire*);

(d) Put an end to arbitrary detention and improve conditions of detention by:

(i) Implementing the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa adopted by the African Commission on Human and Peoples' Rights;

(ii) Ensuring that detention is subject to oversight measures for assessing its legality and compatibility with human rights;

(e) In the absence of an independent and efficient judicial system, cooperate fully with the International Criminal Court in the investigation opened on 25 October 2017;

(f) Undertake an in-depth reform of the judicial system to ensure its independence, impartiality and effectiveness, including by:

(i) Implementing the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa adopted by the African Commission on Human and Peoples' Rights;

(ii) Publishing the conclusions of the national forum on the justice system held in 2013 and convening a meeting of justice-sector stakeholders and international partners to discuss follow-up action;

(iii) Increasing the budget for the justice sector and ensuring that it is managed autonomously;

(iv) Raising the pay levels of judges in the ordinary courts and increasing the resources and facilities available to them;

(v) Computerizing court registries;

(vi) Reviewing the composition of the Judicial Service Commission to ensure that the majority of its members are appointed by their peers;

(vii) Reviewing procedures for the appointment, assignment, evaluation and promotion of judges to ensure that such procedures are not dependent on the executive branch;

(viii) Ensuring strict observance of the principle that judges should have security of tenure;

(ix) Protecting and safeguarding the independence of the judiciary by prohibiting any interference in the administration of justice by government authorities, members of the ruling party or members of the defence and security forces, and imposing penalties on anyone who influences or seeks to influence the administration of justice;

(x) Developing legal aid programmes for persons belonging to the most vulnerable groups;

(xi) Strengthening victim and witness protection mechanisms and improving their effectiveness in order to restore public trust and encourage witnesses to come forward without fear for their safety;

(g) In consultation with the beneficiaries, establish a reparations programme for victims of human rights violations, ensuring that material, symbolic, individual and collective reparations are made available regardless of whether or not the perpetrators are convicted;

(h) Establish the State fund for victims of torture provided for by law, in conformity with general comment No. 4 on the African Charter on Human and Peoples' Rights, adopted by the African Commission on Human and Peoples' Rights, concerning the right to redress for victims of torture and other cruel, inhuman or degrading punishment or treatment (art. 5);

(i) Establish a compensation fund for victims of arbitrary and unlawful detention;

(j) Reform the security sector by:

(i) Ensuring that outsiders are not involved in defence or security activities;

(ii) Clearly defining the roles of the various defence and security forces, in particular the National Intelligence Service;

(iii) Suspending members of the defence and security forces who are suspected of involvement in human rights violations until the relevant investigations and judicial proceedings have concluded;

(iv) Establishing rigorous and transparent selection procedures that include vetting mechanisms;

(v) Strengthening democratic civilian control over the defence and security forces, in particular the National Intelligence Service;

(k) Meet its international obligations to respect, protect and fulfil economic and social rights by:

(i) Developing and implementing State budgets in such a way as to maximize the use of available resources to ensure that the human rights of the sectors impoverished by the political crisis are respected, in particular the rights to food, water and health care, and to develop indicators disaggregated by factors such as gender in order to better inform its policies;

(ii) In consultation with population groups working in the agricultural sector, including women, undertaking reforms with the aim of better protecting women's rights and making better use of land for agriculture, and developing employment opportunities outside the agricultural sector;

(iii) Taking a rights-based approach to the settlement of land conflicts, including those involving persons who fled Burundi either before or after 2015;

(iv) Ending the inclusion of any political considerations in hiring processes for the civil service, State enterprises and public-private enterprises.

87. The Commission recommends that political parties and armed opposition groups refrain from engaging in any attacks on Burundian territory and from any speech calling for violence, and that they join the effort to find a lasting solution to the political crisis.

88. The Commission recommends that the African Union, in its efforts to find a lasting solution to the crisis in Burundi, give priority to respect for human rights and the rejection of impunity, as provided for in its Constitutive Act.

89. The Commission recommends that the technical and financial partners of Burundi:

(a) Suspend, or maintain the suspension of, any direct budget support to the Government until such time as priority is given to the allocation of domestic resources for the fulfilment of the Sustainable Development Goals and the economic and social rights of the population, and effective measures are taken against corruption;

(b) Ensure that grants and financing provided to the Government are earmarked for projects to meet the population's needs, and ensure that such funding is managed effectively and transparently;

(c) Regularly evaluate the impact of financial sanctions on the people of Burundi.

90. The Commission recommends that the guarantors of the Arusha Agreement, in their capacity as committed proponents of a lasting peace in Burundi, continue to seek a durable solution to the political and human rights crisis that will preserve and safeguard the achievements of the Arusha Agreement.

Grundi



Annex II

Correspondence with the Government of Burundi

1. Note verbale sent to the Permanent Mission of Burundi on 10 October 2017



COMMISSION D'ENQUÊTE SUR LE BURUNDI
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Référence:
2017/COI/BRD/NV/30

La Commission d'enquête sur le Burundi présente ses compliments à la Représentation Permanente du Burundi auprès des Nations Unies à New York et souhaiterait l'informer que ses trois commissaires seront à New York du 24 au 26 octobre 2017 pour présenter leur rapport à l'Assemblée générale des Nations Unies conformément aux résolutions 33/24 et 36/19 du Conseil des droits de l'homme.

Pendant leur visite, ils souhaiteraient rencontrer Son Excellence M. Albert Shingiro, Représentant Permanent du Burundi auprès des Nations Unies à New York, afin de discuter des principales conclusions et recommandations de leur rapport.

La Commission d'enquête sur le Burundi remercie la Représentation Permanente du Burundi auprès des Nations Unies à New York de la tenir informée des disponibilités de Son Excellence M. Albert Shingiro pour une telle rencontre et saisit cette occasion pour lui renouveler les assurances de sa haute considération.



Genève, 10 Octobre 2017

Représentation Permanente du Burundi
auprès des Nations Unies à New York
Email : burundi@un.int

2. Note verbale sent to the Permanent Mission of Burundi on 30 November 2017, transmitting a letter addressed to the Minister for Foreign Affairs and International Cooperation of Burundi



United Nations Nations Unies

COMMISSION D'ENQUÊTE SUR LE BURUNDI

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REFERENCE: 2017/COVBRD/NV/37

La Commission d'enquête sur le Burundi présente ses compliments à la Mission permanente de la République du Burundi auprès de l'Office des Nations Unies et des autres organisations internationales à Genève et la prie de trouver ci-jointe, pour transmission, une lettre adressée à Son Excellence Monsieur Alain Aimé Nyamitwe, Ministre des relations extérieures et de la coopération internationale de la République du Burundi, avec copie à Son Excellence Madame Aimée Laurentine Kanyana, Ministre de la Justice et Garde des Sceaux, Son Excellence Monsieur Martin Nivyabandi, Ministre des droits humains, des affaires sociales et du genre, Son Excellence Monsieur Alain Guillaume Bunyoni, Ministre de la sécurité publique, et Son Excellence Monsieur Rénovat Tabu, Représentant permanent de la République du Burundi auprès de l'Office des Nations Unies et des autres organisations internationales à Genève.

La Commission d'enquête sur le Burundi saisit cette occasion pour renouveler à la Mission permanente de la République du Burundi auprès de l'Office des Nations Unies et des autres organisations internationales à Genève les assurances de sa haute considération.

Genève, le 30 novembre 2017.



Mission permanente de la République du Burundi
auprès de l'Office des Nations Unies
et des autres organisations internationales à Genève
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COMMISSION D'ENQUÊTE SUR LE BURUNDI

Réf. 2017/COI/BRD/lettre/24

Genève, le 30 novembre 2017

Excellence,

Le mandat de la Commission d'enquête sur le Burundi a été renouvelé pour une année par la résolution A/HRC/RES/36/19 adoptée par le Conseil des droits de l'homme en septembre dernier. Ayant pris note des réserves exprimées par votre Gouvernement, nous réitérons néanmoins notre souhait d'établir un dialogue constructif avec les autorités burundaises.

La Commission entend continuer à remplir le mandat qui lui a été confié par le Conseil des droits de l'homme de manière indépendante et impartiale. Les enquêtes sur les atteintes aux droits de l'homme commises par les groupes armés d'opposition ou toute autre entité non-étatique font partie intégrale de ce mandat.

Dans ce contexte et dans un souci d'objectivité, nous vous réitérons notre demande, déjà exprimée par courriers en date du 6 février et du 20 mars 2017, de recevoir de la part des autorités burundaises toute information utile à la compréhension de la situation des droits de l'homme au Burundi depuis avril 2015, y compris des informations détaillées sur les atteintes aux droits de l'homme commises à l'encontre de membres du Gouvernement ou du Conseil national de défense de la démocratie – Forces pour la défense de la démocratie (CNDD-FDD), d'autorités administratives ou de membres des forces de défense et de sécurité burundaises.

Nous souhaiterions recueillir en particulier des informations sur d'éventuelles enquêtes ou poursuites judiciaires qui auraient été menées sur les atteintes suivantes : le meurtre du Général Adolphe Nshimirimana, le 2 août 2015 ; l'attaque contre le Général-major Prime Niyongabo, Chef d'État-major, le 11 septembre 2015 ; le meurtre du Lieutenant-Colonel Darius Ikurakure, le 22 mars 2016 ; l'attaque contre le Ministre des droits humains, des affaires sociales et du genre, M. Martin Nivyabandi, le 24 avril 2016 ; l'attaque à l'encontre du Conseiller en communication du Président de la République, M. Willy Nyamitwe, le 28 novembre 2016 ; le meurtre du Ministre de l'eau, de l'environnement, de l'aménagement du territoire et de l'urbanisme, M. Emmanuel Niyonkuru, le 1^{er} janvier 2017, ainsi que plusieurs attaques contre

S.E.M. Alain Aimé Nyamitwe
Ministre des relations extérieures et de la coopération internationale
de la République du Burundi



COMMISSION D'ENQUÊTE SUR LE BURUNDI

des représentants du parti CNDD-FDD et des membres de la Police Nationale Burundaise commises depuis avril 2015 à Bujumbura et dans d'autres provinces.

Lors du dialogue interactif qui s'est tenu devant le Troisième Comité de l'Assemblée générale des Nations Unies le 26 octobre dernier, le Représentant permanent du Burundi auprès des Nations Unies, M. Albert Shingiro, a fait mention de cas spécifiques qui n'auraient pas été documentés par la Commission. Nous vous saurions gré des informations que vous voudrez bien partager avec nous sur ces cas, ainsi que sur tout autre incident qui mériterait une attention particulière de la part de la Commission.

La Commission d'enquête reste disponible pour rencontrer les autorités burundaises afin d'échanger sur cette demande d'information ainsi que sur son travail.

Nous vous remercions, Excellence, de l'attention que vous voudriez bien porter à cette requête et vous prions de croire à l'expression de nos sentiments distingués.

M. Fatsah Ougergouz

Mme Reine Alapini Gansou

Mme Françoise Hampson

Ce :

- S.E.M. Aimée Laurentine Kanyana, Ministre de la justice et Garde des sceaux de la République du Burundi
- S.E.M. Martin Nivyabandi, Ministre des droits humains, des affaires sociales et du genre de la République du Burundi
- S.E.M. Alain Guillaume Bunyoni, Ministre de la sécurité publique de la République du Burundi
- S.E.M. Rénovat Tabu, Représentant permanent de la République du Burundi auprès de l'Office des Nations Unies et des autres organisations internationales à Genève

3. Note verbale sent to the Permanent Mission of Burundi on 11 January 2018

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REFERENCE: 2018/COI/BRD/NV/73

La Commission d'enquête sur le Burundi présente ses compliments à la Mission permanente de la République du Burundi auprès de l'Office des Nations Unies et des autres organisations internationales à Genève et souhaite l'informer que M. Dimiter Chalev est désormais le nouveau Coordinateur du Secrétariat de la Commission d'enquête sur le Burundi.

Mr. Dimiter Chalev souhaiterait rendre une visite de courtoisie à Son Excellence M. Rénovat Tabu, Représentant Permanent du Burundi à Genève, afin de s'entretenir avec lui de la poursuite du mandat de la Commission d'enquête sur le Burundi.

La Commission d'enquête sur le Burundi serait reconnaissante à la Mission permanente du Burundi auprès de l'Office des Nations Unies et des autres organisations internationales à Genève de la tenir informée de la disponibilité de Son Excellence M. Rénovat Tabu pour une telle rencontre.

La Commission d'enquête sur le Burundi tient à adresser ses meilleurs vœux pour l'année 2018 à la Mission permanente de la République du Burundi auprès de l'Office des Nations Unies et des autres organisations internationales à Genève et saisit cette occasion pour lui renouveler les assurances de sa haute considération.

Genève, le 11 janvier 2018.



Mission permanente de la République du Burundi
auprès de l'Office des Nations Unies
et des autres organisations internationales à Genève
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4. Letter sent to the Permanent Mission of Burundi on 2 March 2018



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Le 2 Mars 2018

REFERENCE: 2017/COI/BRD/Lettre/75

Excellence,

J'ai l'honneur de vous informer que, conformément à la résolution 36/19 du Conseil des droits de l'homme des Nations Unies et suite à la démission de Mr Fatsah Ouguergouz, le Président du Conseil des droits de l'homme m'a nommé Président de la Commission d'enquête sur la situation des droits de l'homme au Burundi le 1^{er} février 2018.

A cet égard, je voudrais vous informer que la Commission place mon mandat sous le signe du dialogue inclusif et sera, en conséquence, à l'écoute de tous les secteurs impliqués dans l'amélioration de la situation des droits de l'homme au Burundi. J'espère donc que ma nomination sera de nature à ouvrir un nouveau chapitre de relations de coopération constructive entre la Commission d'enquête, les autorités Burundaises et les acteurs concernés par la situation actuelle des droits de l'homme dans votre pays. La Commission réitère, en conséquence son souhait de s'entretenir, de manière franche et objective, avec les autorités Burundaises dans votre pays et à l'extérieur, en vue de l'accomplissement objectif de mon mandat. Le recueil direct et la présentation objective de la position des autorités Burundaises et de tous les acteurs soucieux de la manifestation de la vérité historique sur les violations des droits de l'homme et atteintes à ceux-ci commis au Burundi d'avril 2015 à nos jours constituent, à cet égard, des facteurs significatifs dans la bonne réalisation du mandat de la Commission.

Son Excellence
Monsieur Rénovat Tabu
Ambassadeur extraordinaire et plénipotentiaire
Représentant permanent de la République du Burundi
auprès de l'Office des Nations Unies
et des autres organisations internationales à Genève
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COMMISSION D'ENQUÊTE SUR LE BURUNDI

PAGE 2

Je vous réitère ma disponibilité pour un dialogue permanent et ouvert. Au cours de l'une de mes prochaines visites à Genève, je souhaiterais avoir l'honneur de vous rencontrer avec les autres membres de la Commission.

Veuillez accepter, Excellence, les assurances de ma plus haute considération.

A handwritten signature in dark ink, appearing to read "Diène".

M. Doudou Diène
Président de la Commission d'enquête sur le Burundi

5. Note verbale sent to the Permanent Mission of Burundi on 13 March 2018

NATIONS UNIES
DROITS DE L'HOMME
HAUT-COMMISSARIAT



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

HAUT-COMMISSARIAT AUX DROITS DE L'HOMME • OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
COMMISSION OF INQUIRY ON BURUNDI • COMMISSION D'ENQUÊTE SUR LE BURUNDI
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REFERENCE:
2018/COV/BRD/NV/78

La Commission d'enquête sur le Burundi présente ses compliments à la Mission permanente de la République du Burundi auprès de l'Office des Nations Unies et des autres organisations internationales à Genève et la prie de trouver ci-jointe la présentation orale qu'elle lira ce jour devant le Conseil des droits de l'homme.

La Commission d'enquête sur le Burundi saisit cette occasion pour renouveler à la Mission permanente de la République du Burundi auprès de l'Office des Nations Unies et des autres organisations internationales à Genève les assurances de sa haute considération.



Genève, le 13 mars 2018.

Mission permanente de la République du Burundi
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6. Note verbale sent to the Permanent Mission of Burundi on 26 June 2018

NATIONS UNIES
DROITS DE L'HOMME
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HAUT COMMISSARIAT AUX DROITS DE L'HOMME • OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
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REFERENCE: 2018/COM/BRD/NV/89

La Commission d'enquête sur le Burundi présente ses compliments à la Mission permanente de la République du Burundi auprès de l'Office des Nations Unies et des autres organisations internationales à Genève et la prie de trouver ci-joint la présentation orale qu'elle lira le 27 juin 2018 devant le Conseil des droits de l'homme.

La Commission d'enquête sur le Burundi saisit cette occasion pour renouveler à la Mission permanente de la République du Burundi auprès de l'Office des Nations Unies et des autres organisations internationales à Genève les assurances de sa haute considération.



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